(25,600)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 770.

F. VITELLI & SON, PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 8, 1917.

1 *Petition.*

United States Court of Customs Appeals.

1474.

F. VITELLI & SONS, Appellants,
against
THE UNITED STATES, Appellee.

To the Honorable the United States Court of Customs Appeals:

Your petitioners F. Vitelli & Sons, having complied with the statutes in such cases made and provided, and being dissatisfied with the decision of the Board of United States General Appraisers rendered herein within sixty days immediately preceding the date hereof, to wit, on the 17th day of September, 1914, in each of the matters set forth and referred to in the annexed Schedule B, which is made a part hereof, as to the construction of the law and the facts respecting the reliquidation and assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of the said Board of General Appraisers, as hereinafter specified, respectfully pray this Honorable Court of Customs Appeals to review the questions involved in said decisions; and for such relief in the premises as the law provides, or as to this court shall seem just.

A statement of the errors of law and fact involved in said decision, of which your petitioners complain, *are* set forth in the annexed Schedule A, which is hereby referred to and made a part hereof.

Dated, New York, November 13, 1914. Albert M. Yuzzolino, Attorney for Petitioners, Office and P. O. Address, No. 233 Broadway, Borough of Manhattan, New York City.

SCHEDULE A.

Statement of Errors of Law and Fact Complained of Herein.

The Board of the United States General Appraisers has overruled the protest filed by the petitioners herein to the reliquidation and assessment of duties made by the collector of customs
2 at the port of New York on certain imported merchandise, thereby making errors as follows:

1st. In overruling the protest of the importers herein.

2d. In refusing to hold that the reliquidations made by the collector herein, are void and without authority in law.

3d. In sustaining as legal and valid, the reliquidations made by the collector of customs herein, which was more than one year after the entry and original settlement and payment of duties.

4th. In holding that the collector of customs had authority in law to make the reliquidations herein.

5th. In refusing to hold that the burden of proof is upon the United States, to show fraud in the entry of merchandise, where more than a year has expired since such entry and settlement of duties, in order to sustain a reliquidation by the collector of customs.

6th. In refusing to hold that the entry and settlement of duty is final and conclusive upon the United States, after the expiration of one year from the time of such entry, unless fraud is proved by the United States.

7th. In refusing to hold that the burden of proof is upon the United States to show fraud in the making of an entry before the collector of customs can have any authority or sanction in law to reliquidate the duty upon merchandise entered more than a year prior to the date of such reliquidation.

8th. In refusing to hold that there was no proof or evidence of fraud in the making of the entries herein, such as is required by law to vest the collector with power to make the reliquidation herein.

9th. In refusing to hold that there could be no presumption of fraud in the making of the entries herein.

10th. In refusing to hold that the record herein contains no proof or evidence of fraud in the making of the entries herein.

3 11th. In refusing to hold that the matters set forth in the record herein was not sufficient to cast upon the importers, the burden of proving the absence of fraud in the making of the entries herein.

12th. In holding that the importers' protests herein could not be sustained without proof on their part of the absence of fraud in the making of the entries herein.

13th. In holding that the collector of customs had the right and authority to reopen and reliquidate the entries and assessments of duties herein.

14th. In refusing to hold that the liquidation and assessment of duties as originally made herein, are final and conclusive upon the United States.

15th. In refusing to hold that the statement of a special deputy collector to the effect that, "satisfactory evidence having been produced before him showing that the returns of weight, etc., were false and fraudulent," is insufficient in law to authorize the collector to make a reliquidation of duties after the expiration of one year from the date of the entry and original settlement of duty.

16th. In refusing to hold that, to impose the burden upon the importers, of proving the absence of fraud in the making of the entries herein in order to avail themselves of the benefits of the defense of Section 21, of the Act of Congress of June, 22, 1874, amounts to depriving the importers of property without due process of law, and a violation of their constitutional rights.

17th. In sustaining the returns of weights made by the collector upon the reliquidations herein.

18th. In refusing to hold that the Board of United States General Appraisers has no jurisdiction to inquire into the issue of fraud herein.

19th. In holding that the facts in this case are "similar if not identical to those which were the subject of this Board's decision in F. Vitelli & Sons' case protest 661651."

4 20th. In deciding the protest herein without giving the appellants an opportunity to be heard before the Board of the United States General Appraisers, or to make their proofs and objections therein.

21st. In overruling the protest of the importers without granting them an opportunity to be heard, or giving them any notice of hearing as provided by statutes, before the Board of the United States General Appraisers.

Albert M. Yuzzolino, Attorney for Petitioners, Office and P. O. Address, No. 233 Broadway, Borough of Manhattan, New York City.

SCHEDULE B.

The following are the importations and entries covered, by this proceeding with the approximate dates thereof, and with such other data as convenient for the purpose of the identifications:

Protest No. 671572/43640. Protest decided September 17, 1914. Entries involved being entries Nos. 175139, 180254, 201505, 228971, 285681.

Endorsed: United States Court of Customs Appeals. Filed Nov. 14, 1914. Arthur B. Shelton, Clerk.

Mandate.—Mandate issued November 14, 1914. Arthur B. Shelton, Clerk.

Bond.—Bond of Anthony J. Coccaro, in the sum of twenty-five dollars, approved by R. M. Montgomery, Presiding Judge. Filed Nov. 14, 1914.

5 Return of the Board.—Board of United States General Appraisers. F. Vitelli & Sons, Appellants, v. The United States, Appellee. No. 1474.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court having ordered the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

1. Protest 671572/43640, with the report of the collector of customs thereon;

2. The entries and invoices covered by the protest, which will be forwarded;

3. The proceedings before the Board, which were returned to the Court with the record in No. 1464 F. Vitelli & Son- v. United States;

4. A copy of the Board's decision in question, Abstract 36544 (T. D. 34774).

Witness the Honorable Jerry B. Sullivan, President of the Board, this thirtieth day of November, A. D. 1914.

O. D. MADGE, *Chief Clerk.* *G. V. O.* [SEAL.]

Reliquidation—Fraud.

Protest 671572/4360.—Ruebsamen & Yuzzolino, Counsellors at Law, 11 Broadway, New York, Oct. 9, 1912.

6 Hon. William Loeb, Jr., Collector of the Port of New York, U. S. Custom House, New York City.

DEAR SIR: We have just received notices of the reliquidation of duty on the following entries made by us, and on which the Government claims to be entitled to a payment of increased duty:

Entry No.	Vessel.	Arrival.		Mdse.		Increase on Reliquidation.
175139	Prin di Piemonte	July 8, 1907	1126	Hamp.	Garlic	$51.01
180254	Neckar	July 10, 1907	880	"	"	55 10
201505	Re D'Italia	Aug. 3, 1907	1198	"	"	183.17
228071	Reg D'Italia	Sep'. 3, 1907	664	"	"	62.71
285681	Re D'Italia	Oct. 30, 1907	878	"	"	88.58
					Making a total of	$440.57

increase of duty claimed by the Government on the foregoing entries.

We beg to hereby protest against the said action of the Collector and against the reliquidation of the duty in each of the entries above mentioned, and against the payment of the said increase of duty claimed, on the grounds, in respect to each and every one of the entries above specified, that the said reliquidations are improper and incorrect; that they are unlawful, and not made pursuant to the provisions of the Statute; that the said reliquidations were not made within the period prescribed by the Statute, in that the original entries and payment of duty on the importations upon which the said increase of duty is claimed, were made upwards of five years prior to the date of the said reliquidations; that the said reliquidations are inaccurate and are based upon unreliable figures and data, and that the reliquidations, as originally made upon the above named entries, are now final and binding upon all parties concerned, and beyond any dispute or scrutiny.

The undersigned also protest upon the ground that, the above

mentioned reliquidations, having been had, in each specific case,
more than one year since the date of the original entry,
7 and payment of duty, are of no effect under the provisions
of the statute, for the reason that the importers deny that there was any fraud connected therewith; and for the reason, also, that there is no competent or sufficient evidence of any fraud whatever connected with the making of said original entries, and no competent or sufficient evidence whatever of any fraud on the part of the importers connected with the said entries; and they further protest upon the ground that the same subject-matter involved in and brought up for issue by the said reliquidations has already been tried before a court of competent jurisdiction, and adjudged in favor of the undersigned, and for that reason the said subject-matter is to be considered as res adjudicata in their favor.

The importers also protest against said reliquidations and each of them, on the ground that the Board of General Appraisers, is without jurisdiction to pass upon the issues raised thereby, and particularly that they have no jurisdiction to pass upon any issue of fraud which may be raised by the said reliquidations, by reason of their being made more than one years after the original entry and payment of duty.

The importers also make this protest upon the ground that the Collector of the Port of New York, or the Special Deputy Collector who made the said reliquidations, and each of them, are without jurisdiction to pass upon the question of fraud, which forms the basis of said reliquidations; and that no binding or competent evidence of such fraud was produced; and that if it was produced, it was in the absence of the importers, and without an opportunity to be heard on their part.

We therefore protest against any claim of payment of the said sum of $440.57 as an increased duty to the Government based upon the foregoing alleged reliquidations and pay said amount under protest.

Respectfully yours,

F. VITELLI & SON,
RUEBSAMEN & YUZZOLINO,
8 *Att'ys for F. Vitelli & Son, No.* 11 *Broadway,*
Borough of Manhattan, New York City.

Endorsed: Custom House, New York. Received Oct. 19, 1912.

Report of the Collector.—October 23, 1912.

Respectfully referred to the Board of U. S. General Appraisers for decision.

The payment forming the subject of the protest was made in satisfaction of the claim of the United States for increased duties found to be due on certain importations of garlic.

Evidence was produced to show that the returns of the U. S. Weigher were false and fraudulent hence the liquidations were declared void and reliquidations made on the true weights as found in the amended returns of the U. S. Weigher.

The limitation for the reliquidation of entries found in section 21, Act of June 21, 1874, does not apply in cases of fraud. Note endorsement of the U. S. Weigher on the returns attached to each entry.

The assessment of duty as made is affirmed.

The protest was filed within statutory time.

Wm. Loeb, Jr., Collector.

Decision of the Board.—Board of United States General Appraisers, New York, September 17, 1914. In the matter of protests 610720/61161 and 671572/43840 of Zucca & Co. and F. Vitelli & Son against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

HAY, *General Appraiser:*

The facts in the cases at bar are similar if not identical to those which were the subject of this Board's decision in F. Vitelli
9 & Son's case, protest 661651, Abstract 36340 (T. D. 34742). Following Vitelli's case, supra, the protests are overruled.

BYRON S. WAITE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed Dec. 1, 1914. Arthur B. Shelton, Clerk.

10 United States Court of Customs Appeals.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 19th day of January A. D. 1915.

Present the Honorable Robert M. Montgomery, Presiding Judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries and George E. Martin, Associate Judges.

The court was opened for business in due form.

* * * * * * *

No. 1464.

F. VITELLI & SON, Appellant,
v.
THE UNITED STATES, Appellee.

No. 1474.

F. VITELLI & SON, Appellant,
v.
THE UNITED STATES, Appellee.

Said causes came on to be heard before the court and after hearing the arguments of counsel the cases were taken under advisement by the court.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

11 In the United States Court of Customs Appeals.

No. 1474.

F. VITELLI & SON, Appellants,
v.
THE UNITED STATES.

Certificate of the Attorney General.

In pursuance of the Act entitled "An Act to amend section 195 of the Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, T. W. Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1474, F. Vitelli & Son, Appellants, v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 16th day of December, 1915.

T. W. GREGORY,
Attorney General.

Filed U. S. Court of Customs Appeals, December 17, 1915. Arthur B. Shelton, Clerk.

12 United States Court of Customs Appeals.

No. 1474.

F. VITELLI & SONS, Appellants,
v.
THE UNITED STATES, Appellee.

For the opinion of the court in the above entitled appeal see transcript of record in the case of F. Vitelli & Sons, Appellant, v. The United States, Appellee, No. 1464.

13 United States Court of Customs Appeals.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 29th day of May, A. D. 1916.

Present the Honorable Robert M. Montgomery, Presiding Judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries and George E. Martin, Associate Judges.

The court was opened for business in due form.

* * * * * * *

No. 1464.

F. VITELLI & SON, Appellant,
v.
THE UNITED STATES, Appellee.

No. 1474.

F. VITELLI & SON, Appellant,
v.
THE UNITED STATES, Appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the decision of the Board of United States General Appraisers be, and the same is hereby, affirmed.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

14 United States Court of Customs Appeals.

No. 1474.

F. VITELLI & SONS, Appellant,
v.
THE UNITED STATES, Appellee.

Motion to Stay Mandate.

Your petitioners respectfully represent that the above-entitled case was decided adversely to the appellants by this court on May 29, 1916; that under Rule 12 of this court the mandate will not issue until June 28, 1916; that a certificate has been filed as required by statute, signed by the Attorney General, certifying that this case is of such importance as to render expedient its review by the Supreme Court; that pursuant to the amendment of August 22, 1914, to section 195 (38 U. S. Stat. 703) a petition for a writ of certiorari must be filed within sixty days next after the issue by the court of its mandate; that your petitioners are informed and believe that the Supreme Court is about to adjourn for the term, if it has not already done so.

Wherefore, your petitioners respectfully pray that, to enable their statutory rights to be preserved, the issue of mandate may be stayed until September 18, 1916.

ALBERT M. YUZZOLINO,
Attorney for F. Vitelli & Sons.

No objection.

BERT HANSON,
Assistant Attorney General Attorney for the United States.

Filed U. S. Court of Customs Appeals June 9, 1916. Arthur B. Shelton, Clerk.

15 United States Court of Customs Appeals.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 12th day of June, A. D. 1916.

Present the Honorable James F. Smith, Acting Presiding Judge, and the Honorables Orion M. Barber and George E. Martin, Associate Judges.

The court was opened for business in due form.

* * * * * * *

No. 1464.

F. VITELLI & SONS, Appellant,
v.
THE UNITED STATES, Appellee.

No. 1474.

F. VITELLI & SON, Appellant,
v.
THE UNITED STATES, Appellee.

Upon motion of appellants to stay the issue of the mandates in said appeals until September 18, 1916, it is—

Ordered that said motion be, and the same is hereby, granted.

* * * * * * *

(Signed) JAMES F. SMITH,
Acting Presiding Judge.

16 United States Court of Customs Appeals.

In accordance with the above motion and order the final mandate, consisting of a certified copy of the order of the Court of the 29th day of May, 1916, was issued to the Board of United States General Appraisers on the 18th day of September, 1916.

ARTHUR B. SHELTON, *Clerk.*

17 United States Court of Customs Appeals.

No. 1474.

F. VITELLI & SONS, Appellant,
v.
THE UNITED STATES, Appellee.

I, Arthur B. Shelton, Clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages, numbered 1 to 16 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 25th day of October, A. D. 1916.

[Seal of the United States Court of Customs Appeals.]

ARTHUR B. SHELTON, *Clerk.*

18 1474.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Court of Customs Appeals, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which F. Vitelli & Son are appellants, and The United States is appellee, No. 1474, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed into the Supreme Court of the United States, Do hereby command
19 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of November, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] 1474. File No. 25,600. Supreme Court of the United States, No. 770, October Term, 1916. F. Vitelli & Son, vs. The United States. Writ of Certiorari. Filed Nov. 28, 1916, United States Court of Customs Appeals. Arthur B. Shelton, Clerk.

20 Stipulation accepting certified transcript of records as the return to writ.

United States Court of Customs Appeals.

No. 1474.

F. VITELLI & SON, Appellants,
against
THE UNITED STATES, Appellee.

The appellants above named having applied to the Supreme Court of the United States for a writ of certiorari to This Court in the above entitled case, and the said writ having been granted on the 24th day of November 1916;

It is now hereby stipulated by and between the counsel for the respective parties hereto, that the certified transcript of record already filed in the office of the Clerk of the Supreme Court of the United States, as part of the application by said appellants for the writ of certiorari as above mentioned, may be taken as the return of the United States Court of Customs Appeals to the said writ.

Dated, New York November 27th, 1916.

ALBERT M. YUZZOLINO,
Counsel for Appellants.
JNO. W. DAVIS,
Solicitor General.

Filed U. S. Court of Customs Appeals, December 1, 1916. Arthur B. Shelton, Clerk.

21 *Return to Writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of F. Vitelli & Son. v. The United States, No. 1474, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this 1st day of December, A. D. 1916.

[Seal of the United States Court of Customs Appeals.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

[Endorsed:] 770/25600.

22 [Endorsed:] File No. 25,600. Supreme Court U. S., October Term, 1916. Term No. 770. F. Vitelli & Sons, Petitioners, vs. The United States. Writ of certiorari and return. Filed December 2, 1916.

In the Supreme Court of the United States

F. VITELLI & SON,
Petitioners,

vs. No. 1464

THE UNITED STATES,
Respondent.

F. VITELLI & SON,
Petitioners,

vs. No. 1474.

THE UNITED STATES,
Respondent.

The petition of F. Vitelli & Son, petitioners above-named, respectfully prays, upon the records herewith submitted, and pursuant to provisions of Sec. 195 of the Judicial Code, as amended by Act of August 22d, 1914, that this Court issue its Writ of Certiorari to review the decision of the United States Court of Customs Appeals rendered in the above entitled causes on May 29th, 1916, upon which the mandate of said Court of Customs Appeals was issued on the 18th day of September, 1916, affirming a decision of the United States Board of General Appraisers.

Dated, New York, October 25, 1916.

ALBERT M. YUZZOLINO,
Counsel for Petitioners,
No. 233 Broadway,
New York City, N. Y.

Statement of the Matter Involved:

Sec. 1. THE LAW: These cases involve the interpretation of Sec. 21 of the Act of June 22, 1874, which provides that

> "* * * whenever duties upon any imported goods * * * shall have been liquidated and paid, and such goods * * * shall have been delivered to the owner * * * such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud * * * be final and conclusive upon all parties."

The Court of Customs Appeals has held in the decision sought to be reviewed, that where a collector of Customs has

> " a well-founded *suspicion* of fraud"

in connection with liquidations of duties made more than a year prior, it lifts the bar of the limitation established by that Act and empowers him to make the reliquidation; and further,—

> "that the collector has the power to reliquidate after one year, and that a suspicion of fraud will support such action" * * * or evidence produced before him "that negatived the absence of fraud."

Petitioners claim that this decision is erroneous and in direct conflict with the decision of the United States Supreme Court in the case of *United States* v. *Sherman & Sons Co.*, 237 U. S. 146, decided by this Court April 5th, 1915, in which it was held that

> "while the tariff act makes the decision of the Collector final as 'to the rates and amount of duties'; and while the act of 1874 provides that when such duties have been paid 'such settlement, after the expiration of one year, and in the absence of fraud, shall be final and conclusive'—yet in neither of these laws did Congress authorize the Collector to make findings of fraud."

And after analyzing the effect of the Government's contention in favor of the Collector's power to make such finding of fraud, the Court continues:

> "The statement of the proposition is well calculated to raise a doubt as to its correctness, *Sabariego* v. *Maverick,* 124 U. S. 261, 391-393. For if the Collector after one year can determine that there has been fraud, and thereupon can make a reliquidation having such characteristics of finality as is here claimed for his finding, he can, as in the present case, do so at the end of 4 years; or as in the Vitelli case, after 7 years; or as in other pending cases referred to in the argument, after 15 years."

Although the Supreme Court in the Sherman case declares that the two leading cases on the subject, viz., *"United States* vs. *Vitelli"* (which is the case at bar on a former appeal), "and *United States* vs. *Federal Sugar Co.* are * * * in direct conflict with each other," the Court of Customs Appeals hold, in its decision, that,—

> "careful reading of Federal Sugar Refining Co., Sherman & Sons Co., and Vitelli & Son decided by this court on the first appeal, shows no conflict in what was decided."

The cases also bring up for review the question whether the construction of the Act of Limitation of 1874, which was rejected by the Supreme Court in the Sherman Case, and sustained by the Court of Customs Appeals in this case, and which imposes upon the importer the burden of proving absence of fraud and of paying the excess duty claimed, before he can avail himself of the defense of that statute, amounts to a depriving of one's property without due process of law. (Page 3 of the record, 16th assignment.)

Petitioners have claimed and still claim that it does.

Sec. II. THE FACTS: Between October 4th, 1905, and December 9th, 1907, the collector of the port of New York liquidated duties on nineteen entries of imported merchandise made by petitioners; which duty was then and there paid, and the merchandise delivered to the petitioners and consumed. Fourteen of these entries are reviewed in the first of the above cases and five in the second, the facts and questions involved being identical in both.

On July 8th, 1912, a special *deputy* collector reported as follows:

> "Satisfactory evidence having been produced before me showing that the returns of weight on the importations of F. Vitelli & Son, covered by the schedule below (being the entries above mentioned), were false and fraudulent, I hereby declare the liquidations made thereon void, and direct that said entries be reliquidated on the basis of the corrected returns made by the United States Weigher." (Page 9 of record, Suit No. 1464.)

The reliquidations were accordingly made as directed and the petitioners duly protested before the Board of General Appraisers, after having paid under protest the excess duty claimed.

The Board of General Appraisers at first sustained the petitioners' protests upon the ground that the collector could only reliquidate after one year, if fraud were established by competent evidence and that as no such fraud had been established, the collector was without power to act.

Upon the government's appeal this decision was reversed by the Court of Customs Appeals and the cause remanded to the Board of General Appraisers for a new trial, the court holding that

> "the existence of fraud is only incidental to the question as to the correctness of the reliquidation, and upon that issue the importers meet and must overcome the presumption that it is correct" (*United States* v. *Vitelli*, 5 Ct. of Customs Appeals, 151).

At the new hearing, petitioners rested their cases upon a state of the record similar in all essentials to the former record, and the Board of General Appraisers thereupon overruled the protests, on the authority of the decision rendered by the Court of Customs Appeals.

The petitioners appealed in both cases, to the Court of Customs Appeals, and pending the decision by that Court, the United States Supreme Court rendered its opinion in the case of *United States* v. *Sherman & Sons Co., supra.*

The Court of Customs Appeals, however, held that the Sherman Case was not controlling; and that the Collector acted within his powers in making the reliquidations in question.

Reasons for the Allowance of the Writ.

Sec. III. The United States Attorney General has certified, pursuant to the authority vested in him, and as provided in Sec. 195 of the Judicial Code, that these cases are of such importance as to render expedient their review by the Supreme Court.

The United States Court of Customs Appeals in its decision has stated that

> "the questions herein involved are of far-reaching importance in the administration of the Customs Laws, involving the right of a collector of customs to reliquidate an entry in any case after one year after the original liquidation" * * * and that "in view of the far-reaching importance of these appeals and the claimed conflict of the cited decisions this court herein gives more extended consideration to the case than otherwise would be had."

Unless the questions herein raised are definitely decided by the Supreme Court there will be a hopeless conflict in the law on a question of vital importance. The Supreme Court in the Sherman Case referred to the existing conflict between two prior decisions on the subject, one of which was the decision of the Court of Customs Appeals in this very case, rendered on the government's appeal; and the Court of Customs Appeals is insisting that there is no such conflict and that the decision in the Sherman Case is not controlling in this case; whereas from the extracts quoted herein it is evident that both those decisions cannot be correct.

As to the Jurisdiction of the Court:

Sec. IV. The granting of the writ herein is authorized by Sec. 195 of the Judicial Code as amended by Act of August 22, 1914; and the two conditions required by that Act in order to confer jurisdiction, are met precisely in these cases, namely:

The judgment of the Court of Customs Appeals which is sought to be reviewed, is upon a question of law governing the collection of customs revenues and therefore is made final by the provisions of the Act; and,

The Attorney General of the United States has, before the rendering of the decision by the Court of Customs Appeals, filed with said court the required certificate, to the effect that the case is of such importance as to render expedient its review by the Supreme Court.

It is therefore respectfully submitted that the petition be granted in both cases as prayed for.

ALBERT M. YUZZOLINO,
Counsel for Petitioners.

Office Supreme Court, U. S.
FILED
APR 15 1918
JAMES D. MAHER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

F. VITELLI & SON

vs.

THE UNITED STATES

No. 97 and 98

On Writs of Certiorari to the United States Court of Customs Appeals

Brief in Behalf of F. Vitelli & Son

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Supreme Court of the United States

OCTOBER TERM, 1918

F. VITELLI & SON,
vs.
THE UNITED STATES.
Nos. 67 & 68.

On Writs of Certiorari to the United States Court of Customs Appeals

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BRIEF FOR F. VITELLI & SON

Statement of the Case

Sec. 1. Two cases are presented herewith; they are identical as to the facts and as to the issues involved, and have been tried, considered and decided as one case. The two writs bring up for review, a decision of the United States Court of Customs Appeals overruling two protests of the importers F. Vitelli & Son to the action of the Collector of Customs of the Port of New York, in reliquidating and increasing the amount of duty on their importations entered more than five years prior.

Case No. 67 involves fourteen such importations, and No. 68, five.

Sec. 2. On July 8th, 1912, one H. C. Stuart, desig-

nating himself as "Special Deputy Collector," made th following "report":

> "Satisfactory evidence having been produced be fore me showing that the returns of weight on th importations of F. Vitelli & Son, covered by th schedule below were false and fraudulent, I hereb declare the liquidations made thereon void, and di rect that said entries be re-liquidated on the basi of the corrected returns made by the United State weigher" (fol. 9).

And on August 1st, 1912, after the importers had file thier protest to said reliquidation and increase of duties (fols. 7 to 9), the Collector, in referring the matter "t the Board of U. S. General Appraisers for decision" (fol. 6), stated in his official report, that

> "The limitation for the reliquidation of en tries found in Section 21, Act of June 21, 1874 does not apply in cases of fraud" (fol. 6).

No doubt concluding this to be one of such "cases o fraud," in view of the report of the said Special Deput Collector just quoted, to which the Collector directs at tention in his own report to the Board (fol. 6)

Sec. 3. The report in suit No. 67 covers importa tions made between October, 1905 and December, 190 (fol. 9); and those covered in suit No. 68, were mad from July to October, 1907 (fol. 6 of record #68). An the original entries and returns transmitted as part o this record on Appeal, show that in each such importa tion, the duty had been liquidated and paid, and th merchandise delivered to the importers from five t seven years prior to the reliquidations. The mer chandise consisted of chestnuts and garlic, and had lon since been consumed.

Sec. 4. Each of the returns on the original entries an liquidations made at the time of importations, now bear the following notation:

"July 9, 1912, * * * This return is hereby declared void because of fraud. Liquidated on basis of corrected return attached.

Thomas D. Haight, U. S. Weigher."

And these so called "corrected returns" show that the U. S. weigher, in the absence of the imported merchandise, attempted to determine its "correct" weight by adopting the returns of weights made by unidentified persons who are in no way connected with the U. S. Customs Service or any of its departments; and in some cases an average is taken, where such weights do not include the entire shipment.

(Entries and returns transmitted as part of this record.)

Sec. 5. The reliquidations thus made purport to show that the imported merchandise was of a greater weight than that determined by the original liquidations, and the excess duty claimed thereon, was paid under protest pursuant to provisions of Sec. 14 of the Tariff Act of 1909 (36 Stat. p. 100) (fols. 7-9 in record No. 67; and 6 to 8 in No. 68).

The Protest:

Sec. 6. Among the grounds of complaint stated in the protest it is declared

"that the said reliquidations * * * are unlawful and not made pursuant to the provisions of the statue; that said reliqiudations were not made within the period prescribed by the statute in that the original entries and payment of duties on the importations upon which the said increase of duty is claimed were made from 4½ to upwards of 6 years prior to the date of the said reliquidations.

* * * * *

The undersigned also protest upon the ground that the above mentioned reliquidations, having been had in each specific case, more than one year

> since the date of the original entry and payment of duty, are of no effect under the provisions of the statute for the reason that the importers deny that there was any fraud connected therewith" (fols. 8-9).

Issues Involved:

Sec. 7. The principal question involved in these cases, is whether the procedure and remedy under the Customs Administrative Act here invoked by the importer, results in a different and harsher *rule of evidence* from that established by this Court in *United States v. Sherman & Sons Co.*, 237 U. S., 146.

In both cases the Collector of Customs, many years after the original liquidation, reliquidated (increased the assessment) because he suspected fraud in the weights of the merchandise.

In the *Sherman & Sons* case the importer held back and compelled the Government to sue him for the increase and this Court decided that the reliquidation upon the ground of fraud carried no presumption of actual fraud, and that

> "the determination of the question as to whether there was fraud involved an exercise of the judicial rather than the executive function, and that therefore such orders" (i. e. orders liquidating duties) "were subject to the general provisions of law by which any other fraudulent judgment can be set aside by the Courts in proceedings seasonably begun."

In the case at bar, the importer, instead of compelling the Government to sue, came forward and paid the increased duties alleged to be due, and proceeded under the established statutory customs plan for their return as illegally exacted, by protest and appeal from the decision of the Collector to the Board of General Appraisers; and in his case, the Court of Customs Appeals held that as

"the Statute (Sec. 21 Act of June 22, 1874) makes the previous liquidation final only 'in the absence of fraud' * * * the Court is of the opinion * * * that the Statute is satisfied with and should be applied by collectors, and it is their duty so to do whenever there is a well founded 'suspicion' of fraud in the case; that where there is such a suspicion of fraud it cannot be said that there is an absence of fraud" (fol. 34).

The following issues are also essentially involved:

1st. Can a collector of customs reliquidate an entry after the expiration of one year from the original entry, settlement and payment of duties, upon his own finding or conclusion or that of a special deputy collector, that there was fraud in such entry?

2nd. Is the validity of such reliquidation properly brought up for review by the remedy of protest to the action of the collector as provided in Sec. 14 of the Tariff Act of 1909?

3rd. Is it legal to determine the weight of imported merchandise on such reliquidation after same has been consumed, from the records of weights made by persons not connected with the U. S. Customs Service?

Proceedings before the Board and Appeals Therefrom:

Sec. 9. The Board at the first trial sustained the protest because no evidence of actual fraud had been offered by the Government and held that the mere reliquidation by the Collector carried no presumption of fraud so as to place any burden upon the importer to rebut the same.

The opinion of the Board (G. A. 7418; T. D. 33115) reads as follows:

"Hay, General Appraiser: The protest in this case challenges the reliquidation of certain entries by the collector of the port of New York

seven years after the original liquidation. The case came on to be heard on the 30th of October, at which time both parties asked the board to determine, by an interlocutory order, whether the importer or the Government had the burden of proof. On the 5th of December the board, after deliberation, filed the following interlocutory order (G. A. 7409; T. D. 32996) to which the Assistant Attorney General duly excepted and submitted the case without further testimony:

> 'Under the provisions of section 21 of the act of June 22, 1874 (18 Stat., 190), the collector is limited in the reliquidation of an entry to one year after the liquidation, except where there has been a protest filed or where fraud exists. Where the entry is reliquidated more than one year after the original liquidation upon the ground of fraud, the burden of proof, in our judgment, is shifted, and the collector is required on the trial of a protest filed against a reliquidation to establish that fraud by a preponderance of the evidence. The burden is therefore upon the collector. This is an exception to the ordinary rule that the action of a public officer is presumed to be correct. The exception rests not only upon the universal principle of law that fraud is never presumed, but upon the further principle that no man should be required, either in a criminal or civil procedure, to prove that he was not guilty of a criminal offense. The presumptions of law are always based upon reason and human experience. To presume a man guilty of fraud because the collector had alleged he was and reliquidated an entry more than one year from the original liquidation would be to require the importer to assume the burden of proving the negative proposition, that he was not guilty of fraud. This would not harmonize with sound reason. Under many circumstances it would be practically impossible, without knowing specifically as to the fraud

with which he was charged, for him to produce evidence to disprove it. We are therefore of the opinion that the burden of proof in this case, so far as the fraud is concerned, which it is contended suspends the operation of the statute of limitations, is upon the United States.'

"As the case comes before us for decision the record discloses that the entries were reliquidated seven years after the original liquidation. In Benziger's cases, G. A. 6224 (T. D. 26898), it was held that section 21, act of June 22, 1874 (18 Stat., 190), was a statute of limitation. * * *

"Under the operation of this section, therefore, the collector can reliquidate an entry after the expiration of one year from the original entry only when there has been a protest filed or when there was fraud in the original entry. There was no protest filed against the original entries in this case, and for the reasons given in the above interlocutory order we are of the opinion that if there was any fraud it was incumbent upon the collector to establish such fraud by competent evidence. As there is no evidence of fraud in this case, the board is compelled to either presume fraud, because the collector reliquidated the entries, or sustain the protest and hold that the reliquidation was without authority of law. Fraud is never presumed. The protest is therefore sustained and the collector directed to reliquidate the entries upon the basis of the original liquidation."

It is submitted that this decision is strictly in conformity with the rule since established in the case of *U. S. v. Sherman & Sons Co.*, 237 U. S., 146.

Sec. 10. The Government, however, appealed to the Court of Customs Appeals, which court, upon the record of the trial before the Board (*U. S. v. Vitelli*, 5 Court of Customs Appeals 151) reversed the Board and held that the burden was cast upon the importer to rebut the presumption of fraud, which presumption they held,

arose from the mere act of the collector in reliquidating for alleged fraud; and that the importer was compelled to affirmatively prove his own innocence.

The Court of Customs Appeals thereafter remanded the case for re-trial by the Board in conformity with that ruling (fol. 12).

Sec. 11. At the re-trial before the Board, the importer stood upon his rights and submitted his case on practically the same record and contentions produced at the first trial; so that the Board felt "bound by the decision of the Court of Customs Appeals above referred to, to overrule the protest," and to reverse their former ruling (fol. 13); and in its second decision, after reciting the ruling by interlocutory order at the first trial, quoted *supra*, that the burden was on the Government to prove fraud, the Board concluded in these words:

> "Upon this decision the case was submitted without testimony and the board, on January 21, 1913, sustained the protest and directed a reliquidation on the basis of the original liquidation. The case was appealed and on February 10, 1914, the Court of Customs Appeals reversed the Board (*U. S. v. Vitelli & Son*, 5 Court of Customs Appeals 151; T. D. 34194), and by order of February 17, 1914, remanded the case for further proceeding. The case was thereupon placed on the calendar of Board 3 for May 25th, 1914, at which time it was submitted upon a record which was praticially the same as that which had been before the Court of Customs Appeals and upon which the original decision of this Board was rendered. We feel bound by the decision of the Court of Customs Appeals above referred to, to overrule the protest."

Sec. 12. The importer then appealed again to the Court of Customs Appeals, and in spite of the case of *U. S. vs. Sherman & Sons Co., supra*, which was decided

in the meantime and brought to its attention, that Court finds no conflict between said case and its former ruling (*Vitelli v. U. S.*, 7 Court of Customs Appeals 243); and in again overruling the importer's protests, held:

> 1st. "What is decided in *U. S. vs. Sherman & Sons Co.* (237 U. S. 146) in no way conflicts with what is here decided" (fol. 50), as both cases did no more than to deny "the conclusiveness of" "a finding or decision of fraud" made by the Collector (fols. 52-53).
>
> 2nd. That the fraud which "is necessary to initiate action under Sec. 21, Act of June 22, 1874" consists of "a well founded 'suspicion' of fraud in the case;" and that upon such "well founded 'suspicion,'" the said statute "is satisfied with and should be applied by collectors, and it is their duty so to do" (fols. 33-34).
>
> 3rd. That "the two matters appearing from the record as transmitted by the collector, (1) that a collector of customs had reliquidated an entry deciding the amount of duty due, and (2) the reliquidation being more than one year after entry, the existence in the record of evidence sufficient to establish probable cause (or well-founded suspicion in the mind of the collector) that fraud was not absent from the case, the Board of General Appraisers had jurisdiction to hear and determine the issues, both as to the amount of the duties and the existence of fraud in the case" (fol. 49).

And then, in sharp conflict with the above and with many other statements of the same import throughout the opinion, it ends abruptly with the proposition:

> 4th. That "were this Court to regard the decision of the Supreme Court in the *U. S. v. Sherman Sons Co., supra*, as applicable to this case, these appellants having by protest to the Board of General Appraisers invoked relief in a tribunal without jurisdiction, are without remedy" (fol. 55).

Sec. 13. Before the decision herein was rendered by the Court of Customs Appeals, the United States Attorney General filed a certificate to the effect that these cases are of such importance as to render expedient their review by the Supreme Court (fol. 15); and the cases now come before this Court by Petitions for Certiorari pursuant to provisions of Sec. 195 of the Judiciary Code, approved August 22, 1914.

The Argument

I

The rule of evidence which determines what proof of fraud is necessary in order to annul a liquidation made beyond the period of limitation found in Act of June 22, 1874, is the same in a hearing before the U. S. Board of General Appraisers on a protest, as in a suit in any other judicial tribunal.

Sec. 14. This Court, in the case of *U. S. vs. Sherman & Sons Co.*, 273 U. S., 146, has decided that an

> "order liquidating duties on goods removed * * * is subject to the general provisions of law by which any other fraudulent judgment can be set aside by the Courts in proceedings seasonably begun."

And that by

> "such general law the party sought to be affected must be informed of the nature of the fraud which the complainant undertakes to establish and must be given notice and opportunity to be heard in his defense, before the old order can be set aside and a new order entered."

As the only difference between this case and the Sherman case, is the procedure and tribunal resorted to,

the facts and the merits being identical, the question naturally presents itself, why has a different result thus far been reached in this case, where the importer sought his remedy under Sec. 14 of the Tariff Act of 1909; quoted in the appendix to this brief.

Sec. 15. A study of the legislation commencing with the act of June 10, 1890, establishing and developing the Special Statutory tribunals for the litigation of customs cases, in substitution for the previously existing remedy by suit against the collector, will show that the plan and purpose of these statutes were only to adopt a new procedure and a new forum but not to change the rules and principles of substantive law theretofore existing; it is the same justice meted out in a new tribunal.

We find an improved, inexpensive, expeditious procedure, judicial in form, but in no way impairing the rights of the litigants.

Sec. 16. By the Customs Administrative Act of June 10, 1890, suits against the collector under §3011 of Rev. Stat. for illegal exaction of duties, were replaced by the remedy of protest and hearing thereon before the Board of U. S. General Appraisers; with right of review from the latter decision, to the U. S. Circuit Court.

Under this act the trial with the introduction of evidence was conducted before the Board, but the Circuit Court had the right to take further evidence.

Sec. 17. In 1909 the Appeals as well as the trials were bodily transferred to the new tribunals and the Court of Customs Appeals was created to hear exclusively all Appeals from the Board of General Appraisers. (Tariff Act of 1909, Sec. 29.); with finality in their decisions except in cases involving constitutional or treaty questions, or where the Attorney General certified that the importance of the question involved, required its review by the Supreme Court.

And under this act the full *nisi prius* trial with all the evidence is to proceed before the Board.

Then comes the Act of 1913, which further amplifies and more firmly establishes this added branch of our judicial structure.

Thus the Supreme Court docket as well as the Circuit Courts have been relieved of a great mass of the ordinary statutory customs cases.

Sec. 18. The function performed by this Board of Appraisers in hearing and deciding protests is not administrative in any sense but strictly judicial. The remedy by trial before the Board is the equivalent for the action against the collector for the illegal exaction of duties. *United States v. Ranlett & Stone,* 172 U. S., 133, 145. And in protest cases it is the only trial allowed the importer. *U. S. vs. Tiffany,* 151 Fed., 473.

When the importer therefore paid under protest and appealed to the Board he was entitled to the same presumption of innocence with the burden upon the Government to prove fraud, as was recognized in the *Sherman & Sons* case; unless he is to be punished for conforming to the established statutory remedy.

This presumption of innocence is not the result of a technical rule of evidence, but is one of the most fundamental and substantial rules of justice known in our jurisprudence; and the importer shou'd not be denied its protection without express statutory enactment.

Sec. 19. If the Government's contention obtains herein and the Court of Customs Appeals was right, it is evident that this class of cases will be taken out of the statutory plan.

For every importer in a similar situation will no doubt prefer to stand suit instead of paying under protest, so that he may escape the burden of proving his own innocence; with the result that such cases will no longer go through the Customs Court of Appeals but by

certiorari will frequently reach the Supreme Court from the various circuit courts of appeal as happened before the establishment of the special plan for customs litigation.

This could never have been the Congressional intent. It was the very thing the act of 1909 was designed to prevent.

However whether the tribunal is a Circuit Court or the Board of General Appraisers, they are both judicial forums; and it would be a travesty on justice to hold that any official may, years after, upset an established order of liquidation upon his *ex parte* finding or allegation of fraud, and then when the accused has taken the necessary steps, to obtain a hearing, including the payment of the sum of money claimed, to hold that this hearing shall commence by his being compelled to prove his own innocence, in order to re-establish the original order.

Sec. 20. This statutory Board or special customs tribunal has all the powers of a Circuit Court of the United States for compelling the attendance of witnesses, the production of evidence and the right to punish for contempt (subsection 12, section 28, act of August 5, 1909). It enjoys a life tenure free from executive control, except for malfeasance in office, inefficiency or neglect of duty. (Subsection 12, section 28, act of 1909.)

All the evidence at the *nisi prius* trial is and must be presented before the Board. That is the only place where examination and cross-examination of witnesses can take place, the jurisdiction of the Court of Customs Appeals being appellate only.

It is submitted therefore, that in passing upon cases of protest against the collector's decision when he liquidates or reliquidates the rate or *amount of duty* (the kind of case here litigated) the Board acts judicially and consequently all the protections of a judicial trial obtain, including the presumption of innocence and

including the burden upon the Government to prove fraud by competent legal evidence.

Sec. 21. That the contest before the Board over the rate and *amount of duty* is judicial in character is well settled by the authorities.

Presiding Judge Montgomery in a concurring opinion in *United States v. Schwartz & Company.*, 3 Court of Customs Appeals 24, at page 32 said:

> "The Board of General Appraisers is in classification cases a judicial tribunal and nothing else."

Again in *United States v. Kurtz Stubeck & Co.*, 5 Court of Customs Appeals, 144, the Court by Judge Smith said:

> "The Board of General Appraisers is a judicial tribunal, clothed with judicial powers to determine the classification of imported goods and the duty which should be imposed thereon. * * *
>
> "The Board having been vested with jurisdiction to make a decision, no error which it might make in reaching its conclusion would render the decision void or open the judgment to collateral attack."

Sec. 22. Even before the creation of the Court of Customs Appeals by the act of 1909 and before the complete record had to be made and the entire testimony taken before the Board of Appraisers (it being permissible before the act of 1909 to take supplemental testimony in the Circuit Court), the function of the Board in deciding a case affecting the rate or amount of duty was held to be judicial in character; *Marine v. Lyon* 65 Fed., 992, 994. *Stone v. Whitridge*, 129 Fed., 33, 36.

Judge Simonton held in *Marine v. Lyon, supra*, that a proceeding on protest to the Board of General Appraisers under the act of 1890 was a *suit against the United States* and that therefore interest upon a refund could not be recovered because not authorized by the statute, saying (page 155):

> "The action in the main case was brought under the act of 1890. That act is the only authority *for such a suit.*
>
> • • • • •
>
> "The Act of 1890 legislating on this same subject, and providing a substitute for the proceeding allowed in that section and *for a suit* and appeal therefrom repeals the section but says nothing whatever as to interest and costs" (Italics ours).

In re Chase, 50 Fed., 695, 697, E. D. of Mass., Judge Colt also said:

> "Under the Act of June 10, 1890, no interest or costs can be recovered againt the United States, because the suit is, in substance, brought against the United States, and the act makes no provision for such payment."

Sec. 23. But whatever was the law prior to the act of 1909, *now that The Board of General Appraisers performs the complete function of hearing all the evidence under the powers of a Circuit Court of the United States, upon which record alone the Court of Customs Appeals determines the case on appeal,* the procedure is necessarily a judicial one.

For instances since the act of 1909 where the Board of Appraisers has been reversed and a new trial *before them* granted because they had taken incompetent evidence or excluded competent evidence, see:

United States v. Freese Co., 4 Court of Customs Appeals, 271, 272, where Judge Smith says in reversing the Board:

> "That does not mean, however, that the legality of the duties exacted is to be determined by judicial or quisi-judicial proceedings without regard to those rules of evidence which centuries of experience have finally confirmed as the safeguards of truth."

United States v. National Aniline and Chemical Co.,

3 Court of Customs Appeals 10, where the Board was reversed for admitting an affidavit and a new trial ordered.

Austin, Nichols & Co. v. United States, 4 Court of Customs Appeals 313, where evidence was improperly excluded by the Board and decision reversed and new trial ordered.

A new trial means a trial in a judicial forum in conformity with the rules of evidence, violation of which rules had compelled remand.

Sec. 24. A *judicial* review of the collector's decision upon protest and appeal under procedure herein adopted, includes many other matters in addition to mere classification.

As for instance—

> Determination of the legality of a charge made by the collector for gauging barrels of molasses, which depended on whether or not a certain statute had abolished such charges.
>
> U. S. v. Jahn, 155 U. S., 109.
>
> Legality of the Secretary of the Treasury's action in ordering the collector to countervail a duty which involved the question whether "under the laws * * of Russia, a bounty is allowed upon the export of sugar, which subjects each sugar, upon its importation into the United States, to an additional duty."
>
> Downs v. U. S. 187 U. S., 496.
>
> Determination of the legality of a regulation promulgated by the Secretary of the Treasury as to the character of proof to be required by the collector, to allow the free entry of certain goods.
>
> U. S. v. Conkey, 6 Court Customs Appeals, 487.
>
> Determination of the *legality* (not the reasonableness) of an appraisement or reappraisement by the Reappraisement Board.
>
> H. S. v. Passavant, 169 U. S., 16.

Whether part of a cargo of fruit which had decayed, came "within the category of goods * * imported into the United States within the meaning of the tariff laws.

Lawder v. Stone, 187 U. S. 281.

A question involving "statutory construction" of two Acts upon which depended whether weight of merchandise at time of entry, or of withdrawal from warehouse, is the basis for calculation of duties.

U. S. v. G. Falk & Bros., 204 U. S. 143.

Legality of collector's act in limiting the time within which proofs as to nonimportation of fruit on account of decay, may be submitted.

Lauricella v. U. S., 4 Court of Customs Appeals, 253.

Construction of commercial treaties or compacts.

B. Altman & Co. vs. U. S. (224 U. S., 583).
U. S. v. Pulaski, 243 U. S. 97.

Sec. 25. These cases were all appeals from decisions of the Board of Appraisers. They involved the correct rate or amount of duty as liquidated by the collector (as does the case at bar) and the soundness of his legal conclusions, without involving any question of classification *proper*.

Examples could be multiplied indefinitely, but the above are sufficient to show how broad is the review on protest and trial before the Board, and how many and what variety of subjects, including such subject matter as is involved in the case at bar, are covered thereby.

The above enumeration of the subjects of litigation arising on protest and appeal to the Board of Appraisers (outside of classification proper and the same is true of classification) demonstrates the strictly *legal character* of these customs controversies and involves the assumption of a "Judicial" hearing before the tribunal now

solely empowered to conduct their trial—to hear all the testimony, direct and cross, and rule on its admissibility and probative force.

The Board of General Appraisers in the litigation for refund of illegal customs taxes, performs the identical function which the Court of Claims performs in similar cases within its jurisdiction and which the United States District Court also performs in a suit for refund of illegal internal taxes.

Sec. 26. Let it be repeated and emphasized that *only upon the record so made at the trial before the Board* can the Court of Customs Appeals determine the questions of law and fact involved in the Board's decision.

If upon appeal before this Court, of a customs case, it saw fit to remand it for re-trial, the only place such new trial could be ordered to take place would be before the Board of Appraisers.

This necessarily involves then a judicial trial before the Board in the strict legal sense of the word subject to all the established rules of evidence and all the burdens and presumptions incident thereto.

Sec. 27. Upon its reappraisement side under Sec. 13 of the Tariff Act of 1909, the functions of the Board of Appraisers may partake of an administratrive character. This the Courts held to be so under former statutes governing reappraisements. Although under the language of the present statute of 1913 that is by no means certain.

But the authorities are uniform to the effect that upon protest and appeal from the collector's action fixing the rate and *amount of duty* (sometimes called the classification or law side, covering issues of the kind here presented) the Board acts as a judicial tribunal and nothing else.

Sec. 28. The trial before the Board then, in a protest case, must include all the safeguards and protections of

a judicial trial and the findings must be controlled in the case at bar by the presumption of innocence, with its resultant burden upon the party alleging fraud, of proving it in the manner known to the law.

This the Board itself assumed and gave judgment sustaining the importer's protest; and only after being reversed by the Court of Customs Appeals did the Board, *under constraint and upon the same record as before, as their second opinion states,* give judgment against the protest (fols. 12-13).

It is submitted that the Board's position as set forth in their first uncontrolled decision was correct.

II

The statement in the opinion of the Court of Customs Appeals that the Board of Appraisers at the second trial may have found fraud, is an erroneous construction of the Board's decision rendered after that trial of the case.

Sec. 29. Judge DeVries, on pages 277 and 278 of his opinion upon the second appeal (7 Court of Customs Appeals, 243) claims that (bottom of page 277), (fols. 49-50 of the record):

> "The evidence in this case, *irrespective of any presumptions,* put the burden of proof upon the importers, and having failed to explain the variances the board was bound to render judgment for the Government."

Again (top of the next page)

> "The board had a right and no doubt did take into consideration that these importers had come to this Court asking for a modification of a previous decision and for an order permitting them to offer proof below; that in their protest, eliminat-

ing the question of fraud, they alleged the reliquidating weights erroneous, that in the ordinary course of business they knew and could prove the true weights, thereby concluding the cause in their favor, yet they failed so to do.

"The two matters appearing from the record as transmitted by the collector, (1) that a collector of customs had reliquidated an entry deciding the amount of duty due, and (2) the reliquidation being more than one year after entry, the existence in the record of evidence sufficient to establish probable cause (or well-founded suspicion in the mind of the collector) that fraud was not absent from the case, the Board of General Appraisers had jurisdiction to hear and determine the issues, both as to the amount of the duties and the existence of fraud in the case, and the evidence of fraud in the record was sufficient to shift the burden of proof upon the importers to explain or contradict that evidence.

"This we regard the legal status of the case upon judgment by the board, * * *."

In making this statement however, Judge DeVries must have overlooked the very clear and pointed language of the Board in its second opinion, Abstract decision No. 36340 (fols. 12-13 of the record,) as follows:

HAY, General Appraiser: By an interlocutory order, the Board on December 5, 1913, decided that the importer was not called upon to prove that he had not been guilty of fraud, but that where the record in the case showed that a reliquidation had occurred more than a year after entry and did not disclose that a protest had been filed, the burden of showing that there was fraud was upon the collector—that the presumption of innocence that attaches to every citizen is stronger than and takes precedence over the presumption of the correctness of the collector's action. Upon this decision, the case was submitted without testimony and the board, on January 21, 1913, sustained the protest and directed a reliquidation on the basis of the original liquidation. The case was appealed and

> on February 10, 1914, the Court of Customs Appeals reversed the Board (*United States v. Vitelli & Son*, 5 Ct. Cust. Applls., 151; T. D., 34194), and by order of February 17, 1914, remanded the case for further proceeding. The case was thereupon placed on the calendar of Board 3 for May 25, 1914, at which time it was submitted upon a record which was practically the same as that which had been before the Court of Customs Appeals and upon which the original decsion of this board was rendered. We feel bound by the decision of the Court of Customs Appeals above referred to, to overrule the protest. The protest is accordingly overruled.

Sec. 30. This shows that the Board did *not* consider the *ex parte* statements forwarded by the collector as creating or tending to "establish probable cause (or well-founded suspicion in the mind of the collector) that fraud was not absent from the case," nor did the Board find these *ex parte* statements to be

> "evidence of fraud in the record * * * sufficient to shift the burden of proof upon the importers to explain or contradict that evidence."

The Board's opinion however, states its dissent from this view, respectfully, but very forcibly.

Sec. 31. Judged by fundamental principles controlling judicial trials, there was no evidence of fraud presented by the Government *at either the first or second trial.* The Government relied solely upon the claimed presumption from the collector's reliquidation supported by *ex parte* statements or writings of private citizens which will be found in the papers forwarded by the Collector and upon which was evidently based his suspicion of fraud moving him to reliquidate (See Point V *infra*).

Shall these *ex parte* papers, which excited the Collector to his suspicion causing him to reliquidate and which he forwarded to the Board with his decision, be held to be of *sufficient validity and probity to shift the burden of*

proof and require the accused to prove *his own innocence?*

Surely not in a judicial tribunal. And there is nothing to show that the Board of U. S. General Appraisers should be excluded from that classification.

Sec. 32. Therefore had the Board one what Judge DeVries intimates they *may have done* (although the record and opinion are to the contrary) that is, if the Board had decided the case upon allegations made in these unauthenticated *ex parte* papers, treating them as if they were *legal evidence* of fraud, such action should be reversed as error, both on the Board's part and on the part of the Court of Customs Appeals in sustaining it.

III

A reliquidation of duties after the expiration of one year from the time of entry, is not valid when based upon the collector's finding that there was fraud in the order of liquidation.

Sec. 33. The argument thus far has proceeded upon the assumption that the question is still open as to whether a collector of Customs has power to declare that fraud existed in the liquidation of duties on an entry more than a year old, so as to base thereon, his right to make a reliquidation of those duties.

It is contended here however, that the *Shermans & Sons* case, *supra,* has settled finally, that Congress has thus far, nowhere authorized "the collector to make findings of fraud" and that

> "The silence of Congress on that subject * * * cannot be construed as the expression of an intent to enlarge the administrative function of the collector into power and jurisdiction to declare that, years before, there had been fraud in the

> procurement of the order liquidating duties on goods removed."

And if this contention as to the collector's power is adopted, or rather re-affirmed, the argument in Points I and II will be greatly strengthened, for certainly no probative force or presumption of correctness can be claimed for a finding of any administrative official which is made beyond his statutory powers.

U. S. vs. Passavant, 169 U. S. 16.

Sec. 34. But the Court of Customs Appeals in deciding this case against the importers, insists that the Supreme Court held no more than that the collector could not

> "make a finding of fraud after one year, which if not protested, would become *res adjudicata* as to the importers" (fol. 33);

That

> "the legal right of the collector to reliquidate for fraud one year after entry" was not "challenged";

And that

> "the statute" (Act of June 22, 1874) "is satisfied with and should be applied by collectors, and it is their duty so to do whenever there is a well founded 'suspicion' of fraud in the case" (fol. 34).

Rather is the statement of this Court in the *Sherman* case that a collector's finding of fraud is not final even though the importer had filed no protest pursuant to the Customs Administrative Act, the conclusion which follows from the denial of that power in the collector, than the main point therein decided.

Sec. 35. Moreover to hold with the Court of Customs Appeals on this point, is to ignore the language of the statute in question. (Act of 1874, quoted in the Appendix to this brief). The Act provides that "such settle-

ment of duties shall * * * *in the absence of fraud* * * * be final and conclusive," and not in the absence of "a well founded suspicion of fraud;" nor does it provide that such settlement of duties shall be conclusive unless evidence is produced *satisfactory to the collector,* that fraud exists.

Wherever Congress intends to confer such power upon an official, it does so in no uncertain terms, as is well illustrated in the cases of *Public Clearing House vs. Coyne,* 194 U. S. 497 and *American School of Magnetic Healing vs. McNulty,* 187 U. S., 94, where the Act in question, Rev. Stat. Sec. 3929, authorizes the Postmaster General:

> "Upon evidence *satisfactory to him* that any person is engaged in conducting any fraudulent scheme * * * through the mails * * * to instruct postmasters to return such mails," etc.

Sec. 36. It follows therefore that when the Collector in this case in his report to the Board of U. S. General Appraisers declares that

> "The limitation for the reliquidation of entries found in Section 21, Act of June 22, 1874, does not apply in cases of fraud" (fol. 6);

and concluded this to be one of those "cases of fraud" because a Special Deputy Collector had reported to him, that

> " 'Satisfactory evidence' had been produced before the latter, 'showing that the returns of weight on the importations of F. Vitelli & Son * * * were false and fraudulent' " (fol. 9).

he, the Collector, acted upon an erroneous construction of the statute.

So that the reason he gives for proceeding as though the government were not barred from reliquidating these old entries, is not sufficient in law.

Sec. 37. The Court of Customs Appeals, intimates that

the Supreme Court in the *Sherman* case accepted without personal inquiry, the statement of counsel that in the 40 years during which the act of June 22, 1874, was in force "there are only two instances reported in which the collector, after the expiration of one year, has attempted to reliquidate because of the existence of fraud;" and states on the contrary, that

> "Instances of reliquidations for fraud covering a period of more than a quarter of a century past are reported" (fols. 31-32).

Three cases are then cited, all Treasury Decisions; and one of them, T. D., 16193, June 27, 1895, is in the form of an official notification from the Treasury Department to the several collectors, of a recent case brought to its attention by one of the U. S. Attorneys (76 Fed., 549). The actual decision in the case referred to, however, was to the effect that the ascertainment of duties complained of was no reliquidation at all, as there was

> "no proof of any 'final ascertainment and liquidation of the duties' by the collector * * * earlier than March 7, 1893";

and that

> "If the liquidation of the entry on March 7, 1893 * * * was in fact a reliquidation, it would be within the prohibition of this statute" (referring to Sec. 21 of Act of June 22, 1914).

The other two instances mentioned, T. D., 16338, June 28, 1895 and T. D., 17967, March 8, 1897 are both decisions of the Board of U. S. General Appraisers upon protests claiming the reliquidations to be without authority as more than one year had elapsed; but in both cases the issue of fraud was accepted and tried out before the Board without in any way raising or discussing the powers of the collector in reference thereto. In the first instance the Board sustained the reliquidation upon its determination that fraud existed, and in the

second, it sustained the protest on the ground that no fraud was shown.

Sec. 38. The opinion of the Supreme Court in the *Sherman & Sons* case, commences with the statement that:

> "The novelty of the practice, the conflict in the two decisions" (meaning *this very case* on its first appeal to the Court of Customs Appeals, and the case of *U. S. v. Federal Sugar Co.*, 211 Fed. 1016) "and the statement that numerous suits on similar reliquidation orders are now pending, justify a somewhat detailed examination of the authority conferred upon the collector of the Tariff Act of 1909; the Act of 1874, and the Customs Regulations prescribing the method of liquidating duties and defining the effect of liquidation orders."

In view of said statement, and of counsel's firm conviction that the decision in that case squarely covers the point now reached, further discussion, or citation of authorities hereunder, would indeed be an act of supererogation.

IV

The validity of the reliquidation herein is properly raised by protest and appeal to the Board of General Appraisers taken pursuant to Section 14 of the Tariff Act of 1909.

Sec. 39. The only difference between the *Sherman & Sons* case and the present case is that in the former, the importers forced the government to their action at law for the increased duty claimed under the reliquidation, whereas, here the importers availed themselves of the procedure and tribunal established by Congress expressly for Customs cases.

Sec. 40. In the *Sherman* case the question certified was:

> "Can an importer * * * when sued * * * for a balance of duties found to be due upon a reliquidation, attack the validity of the reliquidation * * * or is the remedy provided by the Customs Administrative Act * * * *viz.*, of protest * * * and appeal to the Board of General Appraisers, * * * *the only way, in which he may attack the validity of the reliquidation?*" (Italics ours).

To which the Court gave its answer

> "that the importer is not concluded by the reliquidation order, and when suit is brought * * * he may * * * be heard in his defense * * * *even though he did not file a protest* (Italics ours), and make the payment required in the case of the original liquidation."

In this case, where the importers, under precisely similar facts, did

> *"file a protest and make the payment required in the case of the original liquidation,"*

they are met with the objection from the Court of Customs Appeals, that even if that Court were

> "to regard the decision * * * in *U. S. vs. Sherman & Sons Co., supra,* as applicable to this case, these appellants having by protest to the Board of General Appraisers invoked relief in a tribunal without jurisdiction, are without remedy" (fol. 55).

Although this same Court had already declared in their opinion (fol. 49), the exact contrary as to the jurisdiction of the Board herein (see Sec. 44, *infra*).

Sec. 41. The question, therefore, is here squarely presented whether an appeal by protest to the Board of General Appraisers is an available remedy for reviewing the legality of a reliquidation of duties on imported merchandise, which is attacked on the ground that the collector in making it

> "has proceeded on a wrong principle, contrary to law."

The principle upon which the collector proceeded here, is that where evidence is produced which shows to the satisfaction of a Special Deputy Collector, or indeed, to the collector himself, that the returns of weight in a liquidation of duties were false and fraudulent, the bar of limitation established by the Act of June 22, 1874, is lifted; and he is empowered to reliquidate the entry, although more than a year has expired (fols. 6 and 9).

Has the Board of General Appraisers jurisdiction to review this conclusion and say whether or not the collector acted according to law?

Sec. 42. As was argued in Point I, the Customs Administrative Acts since that of 1890, have clearly shown the Congressional plan to be that all litigation in customs cases shall be turned over to the newly and specially created tribunals.

In *U. S. vs. Rantlett & Stone,* 172 U. S., 133, 145, the Court declared that:

> "The remedies provided by the Act of June 10, 1890, furnish the equivalent for the action against the collector which was originally the remedy for an illegal exaction of duties; * * * as in that action so in this proceeding the importer must establish the illegality in order to recover back duties paid under protest."

The former "remedy for an illegal exaction of duties," referred to in the above case was under Sec. 3011 of the Revised Statutes, which section is repealed by the Act of 1890.

Under said Section 3011, the importer certainly would have his action against the collector for the return of duties illegally exacted. When Congress repealed this section, and substituted a new forum and a new procedure to take its place, can it be said that the *remedy* was thereby destroyed?

Sec. 43. The particular section under which these importers pursued their remedy for relief is sec. 14 of the

Tariff Act of 1909 (quoted in the appendix to this brief).

Of that section which existed in the same words in the Act of 1890, this Court held in *U. S. vs. Passavant,* 169 U. S., 16:

> "We think that Sec. 14 (of the Customs Administrative Act of 1890) furnishes the means of redress *for illegal action,* and that the Board of Gentral Appraisers has the same power under this section to inquire into the legality of an assessment as it has under Sec. 13 to see whether or not the valuation is excessive or insufficient through an error of judgment."

And in *U. S. vs. Beers,* 142 Fed., 199, affirmed in 150 Fed., 566, where the protest brought up for review, an appraisal which was considered void, because the appraiser advanced the valuation of imported merchandise without a personal inspection of the goods, the Circuit Court of Appeals held:

> "As was pointed out in *Robertson vs. Frank Bros.,* 132 U. S., 17, the general rule that the decision of the local appraiser is final and conclusive unless reviewed by proceedings of re-appraisement, is subject to the qualification that if the appraiser proceeds upon a wrong principle contrary to law, and that be made to appear, his appraisement is not unimpeachable. The importer in the case at bar therefore, pursued the proper remedy in filing protest and appealing to the Board of General Appraisers."

Sec. 44. The opinion of the Court of Customs Appeals would seem to leave an intending litigant somewhat at sea as to his remedy; for first it declares (fol. 37), that

> "the collector herein neither made, nor attempted to make either a 'finding of fraud' nor a 'decision' that there was fraud. * * * The only thing decided or found by the collector * * * was that the amount of duties previously liquidated was erroneous, and that a different and greater declared amount of duties was due."

and that what is said "beyond that," is

> "no more than a recital of the 'reasons' actuating the reliquidations as to the amount of additional duties as required by the regulations."

And then, although at folio 49 of its opinion, the same Court holds that on the record as presented herein

> "the Board of General Appraisers had jurisdiction to hear and determine the issues, both as to the amount of the duties and the existence of fraud in the case,"

and at folio 53, that

> "The importer may elect tribunals, pay his duties and protest as in this case, or refuse to pay his duties and defend in the District Court."

yet the opinion ends with the abrupt statement, for which its previous pages give no reason or argument, that

> "these appellants having by protest to the Board of General Appraisers invoked relief in a tribunal without jurisdiction, are without remedy" (fol. 55).

Sec. 45. The protest herein does not attempt to raise any issue of fraud, nor can it be considered as an appeal from a finding of fraud by the collector. It is a protest against the act of reliquidation which increases the "amount of duties" fixed by a liquidation made more than a year since, and is based on the contention that the collector proceeded on a wrong principle in acting as he did.

The presence of the alleged evidence of fraud is simply the "reason" or basis upon which the collector rests his authority to act. The situation would be precisely the same if this "reason" were stated to be that the statute of 1874 did not apply because the importer had been absent from the collector's district for part of the period of limitation, which should not be calculated in figuring the time elapsed since the liquidation.

Sec. 46. If the subject-matter in which the collector made his conclusion, was within his powers, the Board of General Appraisers have jurisdiction to review that conclusion.

Here the subject-matter was amount of duties to be charged on imported merchandise. Certainly within the collector's powers.

A state of facts is presented to the collector—whether that be evidence of fraud, or proper computation of period of limitation, or the existence of a proper protest—which makes it necessary for him to determine whether under the law, those facts or circumstances revive the Government's remedy of reliquidation in spite of the Act of 1874; and he construes the law and makes his decision. Can it be denied that he must have power to do so? Similar decisions he is called upon to make almost daily, as enumerated in Sec. 24, *supra.*

And whether or not such decisions so arrived at, be correct, must necessarily be reviewable by the only tribunal now existing to which an appeal can be taken from the official action of the collector.

Should the final decision of the Court of Customs Appeals on this point stand, the importer is indeed without remedy.

Sec. 47. If the Court of Customs Appeals, in denying the right of review herein by the Board of General Appraisers, had in mind the case of *Re Fassett,* 142 U. S., 479, and the Insular Tariff cases, beginning with *De Lima vs. Bidwell,* 182 U. S., 1, those cases are readily distinguishable. No "imported merchandise" was present there and necessarily no possibility of the collector's powers being called into action.

In the case of *Re Fassett,* the Court declared that

> "the collector has no authority to make any determination regarding any article which is not imported merchandise"

and that therefore,

> "the appeal provided for in Sec. 15 (of the Customs Administrative Act of 1890) * * * does not bring up for review the question of whether an article is imported merchandise or not; nor under Sec. 15 is the ascertainment of that fact such a decision as is provided for."

Whereas, the case at bar involves a determination of the amount of duty on admittedly imported merchandise; and a decision of the Collector that in view of certain alleged facts disclosed to him, the Government's remedy of reliquidation was not barred by the limitation found in the Act of 1874.

Sec. 48. "The Court of review," says the *Fassett* case (meaning the Board of General Appraisers) cannot

> "pass upon any question which the collector had not original authority to determine";

but the converse of this must also be true, that any question which the collector has "original authority to determine" in Customs cases, may be reviewed by the only and exclusive method of appeal allowed in such cases.

By the Tariff Act of 1909, Sub. section 13 of Sec. 28, the collector is empowered to

> "ascertain, fix and liquidate the rate and amount of the duties to be paid on such (imported) merchandise * * * according to law."

If he does this very thing in a manner, or at a time which is not "according to law," is it not a question to be raised by the appeal provided for in customs cases? He has not only to determine the "rate and amount" of duties, but also whether the method or time of the reliquidation is "according to law." All these questions are necessarily within his "original authority to determine," and therefore the Court of review established for such cases, must have jurisdiction to pass upon them when properly raised before it.

Sec. 49. Reliquidation of duties on imported merchandise is an act within the recognized authority of the collector; and before the Act of 1874 there was no limitation of time as to the government, within which such reliquidation could be had.

U. S. v. Phelps, 17 Blatch., 312.

This limitation Act, therefore, did not go to the *powers* of the collector, so as to make a reliquidation irregularly made beyond the year's period, and act over which the collector had no "original jurisdiction," but affected only the *remedy;* it limited the time during which that remedy could be exercised, with two specified exceptions.

And the collector, who is the reliquidating official, must also be the proper official to determine whether those exceptions exist.

Sec. 50. In the case at bar, therefore, both the subject-matter and the act, namely, duties on imported merchandise and reliquidation, were within the jurisdiction of the collector; the question presented to him was whether the Act of 1874, which is a statute of limitation (*U. S. v. Phelps,* 17 Blatch., 312) still barred the government's remedy to recover the increased duty claimed, in view of the so called "evidence" of fraud.

The legality of the reliquidation is assailed on the ground that the collector—who, representing the government, stands in the position of any other litigant herein—had lost his *remedy,* and not that the powers he exercised were beyond his jurisdiction.

V

The Collector cannot increase the weights of merchandise as determined by the United States weighers, to a higher weight ascertained from alleged records and accounts of weighings, made by persons who are not authorized U. S. weighers.

Sec. 51. The entries and records of reliquidations which are transmitted to this Court as part of the record herein, contain the so-called amended weigher's returns and show how, in the absence of the merchandise itself, the increased weight is determined in each case. On each of them is written the following:

> "The correct weight as returned herein is ascertained as follows:"

Then follows a statement that "Core & Herbert" or "Visconti" or "Bernard" or "Gastenheimer of Nash & Kendall" or some other person, naming him, weighed a certain number of baskets at a certain weight. None of these persons are United States weighers, or authorized or employed to act as such, nor are they identified in any way. And yet upon this showing, the collector declared void the liquidations based upon the returns of the United States weighers who actually weighed the merchandise, and made the reliquidations "on the true weights as found" in said amended returns (fol. 6).

Sec. 52. It is contended that the collector "proceeded upon a wrong principle and contrary to law" in adopting as the basis of his reliquidations, weights determined in the above manner.

Subdiv. 7 of Section 2621 of the Revised Statutes, makes it one of the duties of the collector "to employ, with the approval of the Secretary of the Treasury, proper persons as weighers, gaugers," etc.

And Section 2890 of the Revised Statutes provides that,

> "the weighers * * * employed in the service of the revenue, shall, within three days after any vessel is discharged, make returns of articles by them respectively weighed * * * and of the vessel. Such returns shall be made by the weighers * * * in books to be prepared by them for that purpose, and kept in the Custom House."

These returns, as held by this court in *Earnshaw v. Cadwalader*, 145 U. S., 247, then became a

> "public record of the government weight of the importation."

And the same case also holds that

> "No Statute authorized a deduction from such government weight in imposing the duty of 75¢ a ton on the ore."

Sec. 53. The Customs regulations of the United States issued by the Treasury Department set forth in great detail the precise manner in which the weighing shall be done and recorded; and in Article 109 thereof, it is provided, among other things, that the weighers

> "will themselves actually do the weighing and record the weights, and will not permit unauthorized persons to handle the scales or other weighing appliances."

These provisions are, of course, enacted to insure proper weighing, made by competent persons subject to established regulations, which also insure the keeping of reliable records thereof; and the importers, as well as the government, are entitled to the protection afforded by them.

In this case the records and returns of the weighers themselves in their "amended returns" show on their faces, that none of these provisions and regulations were observed in determining the weights; they show

that the weights, and records of certain named persons were taken as correct, without question or scrutiny of any sort. They are, therefore, robbed of any presumption which might otherwise be indulged in, that the official weighers proceeded according to law.

Sec. 54. In *Oelberman v. Merritt*, 123 U. S., 356, the importer protested against an excessive valuation, and complained that the appraiser who made it was not duly qualified as required by statute, in that he was not familiar with the character and value of the goods to be appraised. The government contended that the appraiser's competency was to be determined solely by the collector and that the appraisal was final; but the Court held that

> "The importer is entitled to have a merchant appraiser who answers these qualifications (*i. e.*, prescribed by statute) and is entiled to raise the question of a want of qualification by protest, etc. • • • If the merchant appraiser does not possess these qualifications he has no power conferred on him by the statute to act as a merchant appraiser."

In *U. S. vs. Nash*, Fed. Cas. 15856, the United States Circuit Court for the District of Massachusetts, held that

> "duties, where they are required to be assessed on a given weight, must be assessed upon the actual weight when landed, as ascertained by the proper officer of the Customs • • • Appraisers • • • have no authority to determine the weight or quantity of the importation."

Marriott v. Brune, 9 How., 619, involved a protest against an assessment of duties on a cargo of sugar, part of which had been lost and had not arrived in port; and the appraiser in making his valuation, also estimated the quantity on which the duty should be assessed. The Court declared as follows:

> "Something has been urged in argument, on the estimate made by the appraisers and the final character attached to it. However that may be, if one was made in this case, it could be final only as to the price of the sugar abroad, and not as to the quantity or weight reaching this country. The latter is fixed by another class of officers, authorized by law for that purpose; and if the appraisers undertook to fix it, their action in that respect is *coram non judice*, and a nullity."

Sec. 55. It will no doubt be contended that this rule should not be adhered to in cases of fraud. But it must be remembered that the existence of fraud, (assuming, but not admitting, that it may be a factor in this case), does not enlarge the powers and jurisdiction of public officials, nor can it alter the obligation to observe prescribed regulations and statutes which govern their acts.

In the case of *U. S. v. Calhoun*, 184 Fed., 499 (aff'd 215 Fed., 709), which held that a collector could not reappraise the value of imported merchandise, upon a reliquidation of duties, for the reason that the statute made the appraisal final, the Court used the following language:

> "The government insists that a different rule applies in cases in which the appraisal has been procured by fraud. I do not think so. In case there has been a fraudulent appraisal, the Government has the right in sub-section 9 of Section 28 of the Tariff Act, to sue for the full value of the goods, and it then has all the right to procure evidence which any plaintiff has in a Court of Law. Moreover, the offense is criminal, and the United States is therefore protected in that way as well."

Sec. 56. The court below cites the case of *Origet v. Hedden*, 155 U. S., 228, in support of the statement that appraisers may "base their judgment upon 'computations and reports' made by witnesses" (fol. 44); but an examination of this case shows the facts to be that what the appraisers did, was to

> "avail themselves of clerical assistance to average the appraisements given by the different expert witnesses who appeared before them, but that the merchant appraiser testified it was for guidance simply."

In this case, on the contrary, the record shows that the U. S. Weighers did no weighing themselves but took the records of weights made by other persons and adopted them wholly, with the same effect as though they had been ascertained according to law. Certainly such weights so obtained would be a mere nullity in the ordinary case of importations, and there is nothing shown in this case to sustain a different ruling here.

Sec. 57. The right of an importer to have the quantity of his merchandise, which pays duty by weight, determined by legally constituted officials designated for that purpose, and in the manner prescribed by law, is just as important and substantial as his right to have the value of his merchandise, which pays *ad valorem* duty, determined in the same manner; and if an appraisal will be declared void, which has not proceeded according to law, there is no reason why a determination of weights, similarly defective, should not be set aside. Both acts are to form the basis for the assessment of duties, and both are of the same importance and dignity.

In Conclusion

1st: The statement of a Collector or Special Deputy Collector that satisfactory evidence of fraud in the first liquidation was produced, is not sufficient in law to give the collector the right to make a reliquidation of those duties after the expiration of one year, in view of the limitation and restriction imposed by the Act of June 2, 1874.

2d: This being a reliquidation of the amount of duties

on imported merchandise, it was a subject matter over which the collector had original jurisdiction, and the illegality of such reliquidation was properly brought for review before the Board of General Appraisers by protest.

3rd: The same rules of proof should govern the hearing before the Board of General Appraisers herein, as are established by the *Sherman & Sons* case, for guidance in other Courts.

4th: In any event the collector proceeded contrary to law in raising the weight of the merchandise as reported by the U. S. weighers, without a reweighing of same by official U. S. weighers, and the reliquidation based upon such increased weight is invalid. This issue is also properly raised for review before the Board of General Appraisers by protest.

5th: The importers' protests in both cases, therefore, should have been sustained; and error was committed in overruling them.

Respectfully submitted,

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Attorney for Plaintiff-in-Error.

APPENDIX

For the purpose of easy reference, the following statutes which are referred to in this brief, are quoted herewith:

Section 21 of the Act of June 22, 1874 (18 Stat., 190):

Sec. 21. (SETTLEMENT AS TO DUTIES, AFTER ONE YEAR, IN THE ABSENCE OF FRAUD OR PROTEST, TO BE CONCLUSIVE.) That whenever any goods, wares or merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, or merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

Sec. 3011. REV. STAT. "Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, * * * of any moneys or duties, when such amount of duties was not * * * authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties and to recover back any excess so paid."

Sec. 12. Tariff Act of 1909 (36 Stat., 98):

"All notices in writing to the collector of dissatisfaction of any decision thereof as to the rate or amount of duties chargeable upon imported merchandise * * * with the invoice and all papers and exhibits, shall be forwarded to the board of nine General Appraisers of merchandise, at New York to be by rule thereof, assigned for hearing or determination or both."

Sec. 29 of the Tariff Act of 1909 (36 Stat., 105):

"The Court of Customs Appeals * * * shall be a Court of Record. * * * "* * * All appeals allowable by law from

such Board of General Appraisers, shall be subject to review only in the Court of Customs Appeals.

* * * * *

"The Court of Customs Appeals * * * shall exercise exclusive Appellate Jurisdiction to review by appeal * * * final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon * * * and all appealable questions, as to the jurisdiction of said Board, and all appealable questions as to the laws and regulations governing the collection of the Customs revenues." * * *

"If the importer * * * or the collector * * * shall be dissatisfied with the decision of the Board * * * as to the construction of the law and the facts * * * or with any other appealable decision of said Board, they * * * may within 60 days * * * apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision."

Sec. 14 of the Tariff Act of August 5, 1909 (36 Stat., 100):

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within fifteen days after but not before such ascertainment and liquidation of duties, * * * if dissatisfied with such decision, give notice in writing to the collector, setting forth therein the reasons for his objections thereto, * * * Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the Board of nine General Appraisers, for due assignment and determination as hereinbefore provided; such determination shall be final and conclusive upon all persons interested therein, * * * except in cases where an application shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for in this Act.

Supreme Court, U. S.
FILED
APR 23 1919
JAMES D. MAHER,
Clerk

-18-

Nos. 67 and 68

IN THE

Supreme Court of the United States

October Term, 1918.

F. VITELLI & SON, Petitioners, v. THE UNITED STATES.	No. 67
F. VITELLI & SON, Petitioners, v. THE UNITED STATES.	No. 68.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

F. VITELLI & SON, Petitioners, v. THE UNITED STATES.	No. 67
F. VITELLI & SON, Petitioners, v. THE UNITED STATES.	No 68

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES.

Statement of the Case.

These cases are here on writs of certiorari to review judgments of the United States Court of Customs Appeals (7 Ct. Cust. Appls. 243), affirming decisions by the Board of United States Gen-

eral Appraisers which overruled petitioners' protests against assessments of duties made by the collector of customs at the port of New York.

The cases are of considerable importance because of their bearing upon the efforts of the Government to enforce the payment of unpaid customs duties, where the original settlements of duties are tainted with fraud. The principal question herein is both technical and narrow, viz., whether upon the trial of a protest filed under subsection f4, section 28, tariff act of 1909 (36 Stat. 100), the burden of proof rests upon the protestant (who is in the position of a plaintiff) or upon the Government. (Though that statute has been repealed, yet the same question arises under the succeeding similar provision in paragraph N, section III, tariff act of 1913, 38 Stat. 187.) The provision in the tariff act of 1909 read:

> Sec. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within fifteen days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision,

give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as hereinbefore provided; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for in this Act.

HISTORY AND DEVELOPMENT OF THIS LITIGATION.

To show how the crucial question arises, it is necessary first to outline not only the facts antedating petitioners' protests but also the development of this litigation,

Reliquidations by the Collector.

Between October, 1905, and December, 1907, petitioners made at the New York custom house 19 entries of imported merchandise, of which entries 14 are involved in suit No. 67 and 5 in suit No. 68. Though the entries covered various kinds of mer-

chandise, yet these suits involve only chestnuts and garlic, both of which were dutiable by weight. The duties were liquidated by the collector of customs and paid by petitioners; and the merchandise passed into petitioners' custody.

In 1912 there was produced before the collector of customs evidence that the returns of the Government weighers were "false and fraudulent" (R. 4, suit No. 67; R. 5, suit No. 68). Upon his discovery that there had been fraud in the original transactions, the collector declared that the original liquidations were void; and thereupon he made new liquidations of duties upon the true weights as reported in the amended returns of the United States weigher. No question of value is involved. The Government concedes that if there had been no fraud in the original transactions, the collector would have been without power to make the new liquidations.

Most of the original papers which were before the collector when he made the reliquidations, and which were a part of the records before the Board of General Appraisers and the Court of Customs Appeals, have been mislaid and cannot be produced in this court. After the decision below the papers were returned to the collector of customs in whose office they were mislaid. But the official papers in entries Nos. 216546 and 247453 (involved in suit No. 67) have been found and will be produced upon the argument.

To those who are unfamiliar with the official methods at custom houses, the reading of the various notations on the entry papers is not easy. The location of the notations and the different colored

inks used have significance; but the issues in these cases can be presented without delving into those mysteries. We are aided by the following adequate recital of facts made by the Court of Customs Appeals with respect to the entries involved in suit No. 67 (R. 14, suit No. 67):

> These amended returns and the reliquidation thereon relate only to garlic and chestnuts, while some of the entries, 14 in number, cover in addition other merchandise. Upon these corrected weigher's returns are written statements to the effect that the greater part of the reliquidated merchandise had been traced from the importers to various persons who had weighed the same and kept a record of such weights, with which the weights shown in the corrected returns substantially correspond; that in some instances the merchandise had been paid for upon the basis of such weights; and that in at least one case the importers had billed the goods at 46,253 pounds, which was some 3,500 pounds greater than the weight thereof as originally returned by the weigher. We have examined some of the files relating to all these 14 entries, and therefrom it appears that the corrected returns increase the weights above those originally returned in amounts varying from 1,000 to 16,000 pounds in each of such entries.

The opinion says that parallel facts exist in the other case (R. 14, suit No. 67).

Petitioners' Protests.

Had they chosen so to do, petitioners could have declined to pay the increased duties and so have forced the Government to sue. Instead, on being notified of the reliquidations petitioners promptly paid the increased duties. They then protested against the collector's decisions (R. 4, 5-6, suit No. 67; R. 4-5, suit No. 68); and the collector forwarded the protests to the Board of General Appraisers for trial (R. 4-5, suit No. 67; R. 5-6, suit No. 68).

Stripped of their verbosity the protests claimed:

(1) that the collector's decisions as to the rates and amounts of duties were

(a) "not made pursuant to the provisions of the statute,"

(b) "not made within the period prescribed by the statute," and

(c) "based upon unreliable figures and data;"

(2) that the reliquidations, made more than one year after the original entries, were "of no effect under the provisions of the statute, for the reason that the importers deny that there was any fraud connected" with the original entries;

(3) "that the same subject-matter involved in and brought up for issue by the said reliquidations has already been tried before a court of competent jurisdiction, and adjudged in favor of" petitioners;

(4) "that the Board of General Appraisers is without jurisdiction to pass upon the issues;" and

(5) "that the Board of General Appraisers * * * have no jurisdiction to pass upon any issue of fraud which may be raised by the said reliquidations, by reason of their being made more than one year after the original entry and payment of duty." (R. 5-6, suit No. 67; R. 4-5, suit No. 68.)

The First Trial.

In due course the protest involved in suit No. 67 came on for trial. A recital of what then occurred is found in the opinion below (R. 14, suit No. 67). Briefly stated, there was argument as to whether the burden of proof was upon protestants (petitioners here) or upon the Government. Petitioners urged that the burden was on the Government (although it was the defendant) to prove that the collector had a right to reliquidate more than a year after entry, and that to establish that right the Government must prove the existence of fraud in the original transactions. The Government urged that it was for protestants (as plaintiffs in the proceeding) to show, if such were the fact, that the collector was without jurisdiction to reliquidate.

The Board of General Appraisers recognized that ordinarily on the trial of a customs protest the importer has the affirmative of the issue. The board also recognized that, if the original transaction is tainted with fraud, a collector has a

right to reliquidate an entry more than a year after the time of entry. But the board said that the presumption of innocence that attaches to every citizen is stronger than and takes precedence over the presumption of correctness which attaches to the action of a public officer (R. 8, suit No. 67). Seemingly, the board assumed that it is only an importer's fraud which keeps alive a collector's right to reliquidate. The Government contends that any fraud in the transaction, as, for example, that of a Government weigher, is equally effective (page 40, *infra*).

Despite the board's ruling the Government declined to take the affirmative. Both sides rested without offering proof. The board sustained the protest, though petitioners had offered no proof in support thereof (T. D. 33115).

The First Appeal.

On appeal the Court of Customs Appeals reversed the board (*United States v. Vitelli*, 5 Ct. Cust. Appls. 151). Though a copy of the court's opinion is attached hereto as Appendix A, yet we here quote the following paragraph from near the close of the opinion:

> We are of opinion, for the reasons hereinbefore set forth, that it was not incumbent upon the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go

ahead and by proof overcome the presumed correctness of the collector's action. Until this is done it is prima facie correct and must be affirmed.

The Second Trial.

Subsequently on petitioners' motion, the Government not objecting, the case was remanded to the Board of General Appraisers for a trial upon the merits (R. 15, suit No. 67). Thereafter the protest involved in suit No. 67 and that involved in suit No. 68 came on for trial together. Petitioners would have succeeded by proving either

(a) that the collector was without power to reliquidate because there was no fraud in connection with the original settlement; or

(b) that the actual weight of the garlic and chestnuts was less than the weight upon which the collector assessed duties upon the reliquidations.

Petitioners attempted to prove the non-existence of fraud by offering in evidence certified copies of three indictments against one Joseph Vitelli and the record of his acquittal; but they did not offer to connect the indicted and acquitted Joseph Vitelli with the petitioners. Whether "F. Vitelli & Son," the petitioners, are a copartnership, a corporation, or an individual doing business under that name is not disclosed. Petitioners offered the records "on the ground that they show conclusively the non-existence of fraud in the making of the en-

tries." Upon the Government's objection the records were excluded (R. 7, suit No. 67). The Customs Court held that the exclusion of the documents was proper (R. 33-34, suit No. 67). Petitioners' brief in this court does not question the soundness of the exclusion. That seems finally to dispose of that claim in the protest which on page 6 hereof we have numbered (3).

The Customs Court had already held that to sustain their contention that the collector was without jurisdiction to make the reliquidations, petitioners must show the non-existence of fraud in the original transactions. At the opening of the trial their counsel said that up to the last time the cases were on the trial docket he had intended to offer proof as to weights, but that he had decided not to do that (R. 7, suit No. 67). After the exclusion of the proffered documents, petitioners made no further offer of proof.

If petitioners had established the correctness of the weights on which duties were taken originally, necessarily their protests would have been sustained. Perhaps petitioners could have explained that instance referred to by the Court of Customs Appeals, where "the importers had billed the goods (to their customers) at 46,253 pounds, which was some 3,500 pounds greater than the weight thereof as originally returned by the weigher." Perhaps they could have explained why it was that in the 14 entries involved in suit No. 67 (as pointed out by the Court of Customs Appeals) "the corrected returns increase the weights above those originally returned in amounts varying from 1,000 to 16,000 pounds in each of such entries."

The first time the protest in suit No. 67 was before the Court of Customs Appeals, that court adverted to those facts and intimated that it considered them "evidence of fraud, which, unexplained, would seem to import a deliberate and, for a time at least, successful attempt to pass many thousand pounds of merchandise through the customs without paying duty thereon." (*United States v. Vitelli*, 5 Ct. Cust. Appls. 151, 157.) Though most men would welcome opportunity to meet and explain away such damaging evidence, yet petitioners elected to stand mute—as was their undoubted privilege.

Counsel for petitioners made a statement, which, on the record, seems to have been both voluntary (in the sense that it was uncalled for) and irrelevant to anything then before the board. However, the principal difference between the parties was as to which had the affirmative of the issue. Counsel for petitioners said (R. 8, suit No. 67):

> The importer also excepts to the ruling of the court to the effect that the burden is upon him to show the non-existence of fraud in these cases, upon the ground that it imposes upon him an unlawful, unreasonable and impossible burden, as a condition to his availing himself of the benefits of Sec. 21 of the act of June 22, 1874, and therefore deprives him of his property without due process of law, and is in violation of his rights under the U. S. Constitution.

Both parties then rested (R. 8, suit No. 67). There was no proof before the board other than that contained in the official papers which, under

the statute and Customs Regulations, the collector had forwarded to the Board of General Appraisers. Necessarily the board overruled the protests. Though the protests were tried together, yet separate decisions were rendered (R. 8-9, suit No. 67; R. 6, suit No. 68).

The Second Appeal.

Appeals were then taken, and the Court of Customs Appeals affirmed the decisions below. In the exhaustive opinion delivered by De Vries, J., there is an elaborate examination and masterful discussion of some of the fundamental principles of customs administration and customs litigation (R. 10-48, suit No. 67). So many of those now engaged in the practice of customs litigation had, in dealing with existing statutory provisions, so far either forgotten or overlooked the underlying principles of, and the reasons for, the present-day practice, that such a collation of authorities and restatement of principles was timely and apposite. But the questions which are crucial in these cases as they come to this court do not call for a detailed examination of the fundamentals—especially as petitioners do not now question the soundness of some of the fundamentals stated by the Customs Court.

One of the Court's findings of fact.

The court found as follows (R. 42, suit No. 67):

> Upon protest and appeal to and the case being called by the board, all parties being present, determination of the issues proceeded. All evidence offered (the indictments and records of acquittal) were excluded, and the case submitted upon the record before the collec-

tor, as detailed. What then was the legal status of the case as submitted to the Board of General Appraisers?

* * * * * * *

The record contained evidence that negatived the absence of fraud. The evidence of persistent variances in and sales at greater weights, being evidence of fraud, destroyed any persumption of innocence attending the importers. (Italics copied from original.)

Certificate of Importance.

The Attorney General filed a certificate of importance under the Act of August 22, 1914 (38 Stat. 703), amending section 195 of the Judicial Code. The certificate was filed, as it had to be, while this litigation was still undecided in the Customs Court. Many of the questions heretofore discussed herein were so effectually disposed of by the court below that they are not raised in this court. If there is left any question of moment, it is as to whether petitioners had the affirmative upon the trial of the instant protests.

Section 21 of the Act of June 22, 1874; and the Reason and Purpose of its Enactment.

Not only does the instant litigation largely turn on the effect of section 21 of the act of June 22, 1874, but also the statute is of considerable importance generally in the administration of the customs laws. So far as we know, the history of the section and the purpose of its enactment have

never been presented to this Court, which accounts for our treating the section at somewhat unusual length.

The section reads:

> That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

THE REASON AND PURPOSE OF THE ENACTMENT.

To determine the effect of a statute it is well not only to examine the statute itself but also to inquire as to the evils which the Congress sought to eradicate.

In *Smythe v. Fiske* (90 U. S. 374) the court said (p. 380):

> The preexisting law and the reason and purpose of the new enactment are also considerations of great weight.

In *Heydenfeldt v. Daney* (93 U. S. 634) the court said (p. 638):

> There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.

There had long been statutes promising large financial rewards to those who aided in the uncovering of frauds against the customs-revenue; but to get a picture of the then existing conditions we need go no further back than the act of March 2, 1867 (14 Stat. 546) which was still in force in 1874. The first section of that act provided for the distribution of the proceeds of fines, penalties and forfeitures incurred under the provisions of the laws relating to the customs. After certain deductions were made, the residue was distributed as follows: one-half to the Government; one-fourth to the informer or in certain cases to the customs officer making the seizure; and one-fourth to certain local customs officers. In case it could be made to appear to the satisfaction of a judge of the district court that a fraud on the revenue had been committed, the second section of that act made drastic provision for the seizure and retention of invoices, books and papers relating to the merchandise in respect to which fraud was alleged to have been committed.

As might have been expected, there were great abuses of the power conferred by the act of 1867. The incentive of financial reward spurred customs officials and others to great activity in the search for customs frauds. Whether honest or dishonest, every importer was the object of suspicion and lia-

ble to attack. He did not even have the protection of a statute of limitations. Importers felt that their books and records were always subject to seizure; and that to get moieties, customs officers and others were constantly digging up entries as to which there were technical irregularities, even though there had been no intention to defraud.

Not only were merchants' books, records, and transactions open to examination *ad infinitum;* but, as we shall show (p. 31, *infra*), there was no time limitation upon collectors' power to liquidate anew. Further, unless the collector's reliquidation were set aside by means of a statutory review, such reliquidation became final and conclusive upon the importer (pp. 29-30, *infra*). In a suit for increased duties it was not necessary for the Government to show that the collector's liquidation was correct, nor could the importer impeach the liquidation by showing irregularities.

Watt v. United States, 15 Blatch. 29, Fed. Cas. No. 17292;
United States v. Cousinery, 7 Benedict 251, Fed. Cas. No. 14878;
Westray v. United States, 18 Wall. 322.

It has been said that there was a crying evil of systematic reliquidations made long after the settlements of duties upon the original liquidations. Actions for forfeitures and for fines were instituted as to transactions which had long since been forgotten—transactions as to which, because of the lapse of time (even a generation or more), all interested parties were dead and all records destroyed. Actions were instituted with respect to entries which

were moldy with age; and huge penalties were recovered to the great financial benefit of informers and spies.

Those conditions begot such a public outcry that the House Committee on Ways and Means made an investigation which is recorded in House Miscellaneous Document No. 264, of 1874. That investigation resulted in the introduction of the bill which later became the act of June 22, 1874, entitled "An act to amend the customs-revenue laws and to repeal moieties." Reporting the bill from the Ways and Means Committee, Congressman Ellis H. Roberts said:

> The measure which is now submitted for action commends attention by its importance * * *. It reduces the period of limitation within which suits may be commenced. * * *
>
> The aim is to do brave work towards the adjustment of customs legislation to the standard of freedom and intelligence attained in our other statutes.
>
> The bill is an outgrowth of an investigation of the Committee on Ways and Means recorded in a volume of nearly 300 pages. Representatives of the merchants of leading cities have been heard and the committee have sought information from the most competent experts in the service of the Government. Rarely have stronger appeals come to Congress than those for the reforms here proposed. * * *
>
> The first duty of the Government is to remove every just ground of complaint against the laws and their administration. * * * For the collection of the revenue one of the

primary essentials is the moral support of those who pay. This has been to an alarming degree lost. Sympathy has been aroused for those charged with offenses against the customs. Penalties enforced in accordance with the letter of the law have incited odium. The machinery of a past age, the rigors of the war period, the monstrous forfeitures of our system have borne their natural fruit. * * * We have heard general denunciation of demoralization among importers. * * * If they be offenders, provide penalties against them which can be enforced by the courts. Let them be certain, and not dependent upon the temper of customs officers nor upon the discretion of the Secretary of the Treasury. Your fines and forfeitures are now so enormous, that suits begin with compromise and often end in remission. The Government bears the odium of cruel extortions without their profit. Our statutes array merchants in hostility without advantage. The honest importer is annoyed and terrified by the shadow of ruinous penalties never collected. It will cost nothing to change this situation. Very much can be gained. * * *

The large interest of the officers has led to the employment of base means for the detection of fraud, to extreme constructions classifying as criminal acts without intent of wrong, to toleration of acts years afterwards denounced as criminal, and to the enforcement of penalties disproportionate to the offense and ruinous to men who have no crime in their hearts. * * * It cannot be wise to have it

the interest of officers to permit violations of law, to reward them for crimes committed, to enrich them by prosecutions, to pay them for creating antagonisms between the citizen and the Government. The interest of the officers should be on the side of the Government but not against the importer. * * * The chief customs officers construe laws, administer them, direct prosecutions, receive propositions for compromise and settlement. They appear as prosecutors, they are neither judge nor jury but their opinions have as much force as either; yet the laws give them moieties of the proceeds of every case.

Cong. Rec., 1874, Vol. 2[5] pages 4028-4030.

THE REMEDY PROPOSED.

During the investigation by the Ways and Means Committee a statute of repose was suggested by Mr. H. D. Hyde, representing the Boston Board of Trade (p. 16, House of Representatives Miscellaneous Documents 264, 43rd Congress, First Session). The committee adopted the suggestion; and in the exact phraseology presented by Mr. Hyde the provision was inserted in the committee's bill as section 21. It read:

That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been deliv-

> ered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

In this form the section was passed by the House of Representatives. The section was finally adopted in this form, except that by Senate amendment a clause reading "after the expiration of one year from the time of entry" was inserted after the words "such settlement of duties shall." Later on reference will be made to the effect of this insertion, but the intent of Congress can be the more easily arrived at by analyzing the section in the form in which it passed the House.

As thus framed the section related to both free goods and dutiable goods. Until free goods were passed free of duty, they did not fall within the provisions of the section. Until duties on dutiable goods were liquidated and paid, such goods did not fall within the provisions of the section. Neither free nor dutiable goods fell within the provision of the section until they passed out of customs custody.

Importers asked and the House proposed that (a) the passage of certain goods free of duty, and that (b) the settlement of duties on certain other goods should "be final and conclusive upon all parties;" but that finality should attach to the transactions only "in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee." When there was a protest or when there was fraud, finality was not to attach.

Why was it that importers did not ask for finality when there was either (a) a protest, or (b) fraud?

Keeping in mind that, as introduced, the bill did not contain the clause "after the expiration of one year from the time of entry," the reason for the insertion of the in-the-absence-of-protest clause becomes obvious. By section 14, act of June 30, 1864 (13 Stat. 214), Congress had extended the time within which an importer might protest against the collector's decision. The protest could be filed up to ten days *after* the ascertainment and liquidation of the duties. Had section 21 been enacted without the in-the-absence-of-protest clause, the effect would have been to prevent the filing of a protest after liquidation. Had the bill been passed in that form, it would have provided that upon payment of the duties and delivery of the merchandise, the settlement of duties should, in the absence of fraud, be final and conclusive upon all parties. Mr. Hyde and the importers he represented did not want that. They did not desire to curtail their existing right to review collectors' decisions. Neither did Congress seek to curtail the right of review which it had theretofore granted.

The desirability, if not the necessity, of inserting the in-the-absence-of-protest clause is brought home by the language of Mr. Justice Strong in *Westray v. United States* (18 Wall. 322) in October, 1873. He said (p. 330):

> The limitation of the right to complain or to appeal commences with the date of the liquidation, whenever that is made.

Apparently here was a declaration by the Supreme Court that an importer's right to protest began with the liquidation and terminated ten days thereafter. How common was the opinion that a protest could be filed only after liquidation is indicated by the language of Chief Justice Waite who took that view of the law when sitting at circuit in 1878 (*Watt v. United States,* 15 Blatch. 29). The same view was taken by the Solicitor General when arguing before the Supreme Court as late as January, 1889 (*Davies v. Miller,* 130 U. S. 284). In deciding that case the Supreme Court pointed out (p. 290) that some expressions of judges of that court seemed to support the Government's contention; and the court distinguished *Watt v. United States, supra,* and *Westray v. United States, supra.* After the expression of the Supreme Court through Mr. Justice Strong in 1873, it was incumbent upon one drafting a law that made *un*contested settlements of duties forthwith "final and conclusive upon all parties" to insert in his draft some provision which would preserve both importers' right to protest and the power of appellate tribunals to grant relief.

The reasons why importers did not ask that fraudulent settlements be made "final and conclusive upon all parties" is obvious. Importers were asking Congress for relief for honest importers. They did not seek protection for dishonest men. So in Mr. Hyde's proposal there was no suggestion that finality be accorded to customs transactions which were tainted with fraud. As was said by Senator Sherman while discussing this section on the floor of the Senate:

> It is perfectly manifest that this section is intended to prevent stale claims from being made against persons who have imported goods free of duty or who have imported goods and paid the duties in good faith, everybody supposing the settlement was right, and afterward it should turn out by accident or design that too little was collected or some mistake made. *This excludes from the benefit of the section every case of fraud.* * * * It simply prevents a man who has paid honestly and fairly, in the absence of fraud, from being bothered and harassed afterward.
>
> *Cong. Rec.* 1874, Vol 2[5] page 4726.

In Appendix B will be found a record of the proceedings in the Senate at the time of the adoption of the amendment to the section. The proceedings show beyond question that there was no intention on the part of anybody to have section 21 apply to any transaction which was tainted with fraud.

While it was originally proposed that honest settlements as to which there was no protest should immediately become "final and conclusive upon all parties," the Senate so amended the section that the stamp of finality should become affixed only "after the expiration of one year from the time of entry." The insertion of that clause had no effect upon the phrase "in the absence of fraud."

Petitioners' Shift of Position Relative to Jurisdiction of Board of General Appraisers.

The claim of the protests which we have numbered (4) is that the Board of General Appraisers was without jurisdiction to pass upon the issues. Even on the trial petitioners protested that they ought not to be compelled to try the issues before the board, as that would be in violation of their right to a jury trial as guaranteed by the United States Constitution (R. 8, suit No. 67).

But curiously petitioners now devote the fourth point (7 pages) of their brief to demonstrating that they had a right to test the validity of the collector's action by a statutory protest. Distorting the meaning of one sentence violently wrenched from its context, petitioners assert that the opinion of the Court of Customs Appeals said that petitioners were without remedy because the Board of General Appraisers was without jurisdiction. The Customs Court did not say that. It specifically held that "the Board of General Appraisers had jurisdiction to hear and determine the issues" (R. 43, suit No. 67) and affirmed the board.

Petitioners' brief bases its fourth point upon the last sentence of the opinion below. Obviously that sentence was the court's answer to a position taken by petitioners which the court held to be unsound. Were their contention true, that sentence would apply; but the court held that their contention was not sound. Therefore, the expression is applicable only to a condition of law asserted by counsel for petitioners which the court had already held not presented in or applicable to the case.

The availability of the remedy by protest has not been questioned by the Government, by the Board of General Appraisers, or by the Court of Customs Appeals. Petitioners' present contention is not only at variance with, but also an abandonment of, their claim that the Board of General Appraisers did not have jurisdiction of their protests.

The Issues.

The issues herein are

(a) Upon the trial of their protests, was the burden of proof upon petitioners or upon the Government?

(b) If the burden of proof was upon the Government, was that burden met by the evidence contained in the record?

(c) If the record shows that the collector did assess duties upon the wrong weights, did petitioners show upon what weights he should have assessed duties?

Brief of Argument.

I. The collector's original liquidation is not final against the Government; and prior to the act of June 22, 1874, there was no time limitation upon the collector's power to reliquidate.

II. Section 21 of the act of June 22, 1874, does not limit the time within which the collector may reliquidate a fraudulent entry.

III. The act of 1874 did not shift the burden of proof on the trial of a protest against a reliquidation made more than a year after entry.

IV. If the act of 1874 shifted the burden of proof to the Government, that burden is met by the evidence in the record.

V. The act of 1874 is not applicable to the instant entries, because there had been no such "settlement" as is contemplated by that act.

VI. The collector assessed duties upon the right weights. But even if he did not, petitioners have not shown upon what weights he should have based his assessments.

Argument.

POINT I.

The collector's original liquidation is not final against the Government; and prior to the act of June 22, 1874, there was no time limitation upon the collector's power to reliquidate.

From the beginning of our Government it has been the duty of the collector of customs to ascertain, fix and liquidate the rate and amount of duties to be paid on imported merchandise. The statutes in force while the instant entries were before the collector of customs were section 13 of the Customs Administrative Act of 1890 (26 Stat. 137) and the amending act, subsection 13, section 28, of the tariff act of 1909 (36 Stat. 100). When the collector has before him the returns of the surveyor as to weight, gauge, or measurement, the report of the appraiser as to quantity and character of the merchandise, and the report of the appraising officer or tribunal as to value of the merchandise, the collector decides the classification of the merchandise, the applicable rate of duty, and the dutiable costs and charges. He then makes the final computation of the amount of duties due to the Government. This is called the liquidation. Some of the steps preliminary to liquidation are refered to in

Kimball v. The Collector, 10 Wall. 436, 446 et seq.

Also see

Merritt v. Cameron, 137 U. S. 542, at pages 544 and 550.

The assessment and collection of duties is an administrative matter.

United States v. Sherman, 237 U. S. 146, 153.

The duties so assessed constitute a lien upon the imported merchandise.

Harris v. Dennie, 3 Pet. 292, 302;
United States v. Mexican International R. Co., 154 Fed. 519.

The duties so assessed also constitute a personal debt and charge upon the importer, which liability may be enforced by appropriate action.

Meredith v. United States, 13 Pet. 486;
United States v. Mexican International R. Co., 154 Fed. 519;
United States v. Lyman, Fed. Cas. No. 15,647;
United States v. National Fibre Board Co., 133 Fed. 596;
United States v. Boyd, 24 Fed. 690.

There is no limit of time within which a collector must liquidate the duties. If he wishes, he may delay for many years.

United States v. De Rivera, 73 Fed. 679;
Gandolfi v. United States, 74 Fed. 549;
Abner Doble Co. v. United States, 119 Fed. 152;
Pacific Creosoting Co. v. United States, 196 Fed. 35.

It has long been the law that, once made, the collector's liquidation is final and conclusive against an importer unless within a prescribed time he begin statutory proceedings to review the collector's decision.

Nichols v. United States, 7 Wall. 122, 129-131;
Andreae v. Redfield, 98 U. S. 225, 228, 232;
Arnson v. Murphy, 109 U. S. 238, 243;
Arnson v. Murphy, 115 U. S. 579;
Porter v. Beard, 124 U. S. 429;
Davies v. Miller, 130 U. S. 284;
Shoenfeld v. Hendricks, 152 U. S. 691;
Gulbenkian v. United States, 186 Fed. 133;
United States v. Tiffany, 151 Fed. 473;
Houlder v. United States, 4 Ct. Cust. Appls. 247, 251;
United States v. Cousinery, Fed. Cas. No. 14878;
Sec. 14, Customs Administrative Act of 1890 (26 Stat. 137);
Subsec. 14, sec. 28, tariff act of 1909 (36 Stat. 100);
Par. N, sec. III, tariff act of 1913 (38 Stat. 187).

But the collector's original liquidation is not final and conclusive against the Government. He may thereafter reliquidate, i. e., cancel the earlier liquidation because of mistake, error, fraud or other reason and then make a new liquidation.

United States v. Phelps, 17 Blatch. 312, 27 Fed. Cas. No. 16039;

United States v. Mexican International R. Co., 151 Fed. 545;
Louisville Pillow Co. v. United States, 144 Fed. 386;
Cassel v. United States, 146 Fed. 146;
Neresheimer v. United States, 131 Fed. 977;
Knowles v. United States, 122 Fed. 971;
Forbes & Wallace's case, T. D. 23655.

The reliquidation has all the validity of the original liquidation. When made, it becomes the liquidation in lieu of the original.

Louisville Pillow Co. v. United States, 144 Fed. 386, 388;
Robertson v. Downing, 127 U. S. 607, 613;
United States v. Mexican International R. Co., 151 Fed. 545, 548;
United States v. Leng, 18 Fed. 15, 18-19;
Dickson v. United States, 131 Fed. 573.

In short, to reliquidate is merely to liquidate anew. When a collector reliquidates he merely liquidates anew because of facts or information which were not utilized or not available upon the earlier liquidation. He is simply performing his duty by ascertaining, fixing, and liquidating the rate and amount of duties due on imported merchandise.

Even where there has been a liquidation which was erroneous (whether because of mistake, fraud, or other cause), such liquidation remains valid until abrogated by a new liquidation; and the new liquidation is a necessary preliminary to any remedy for deficiency growing out of the preceding erroneous liquidation.

United States v. Campbell, 10 Fed. 816, 822;
United States v. Leng, 18 Fed. 15, 18-19;
United States v. McDowell, 21 Fed. 563.

Prior to the act of June 22, 1874 (18 Stat. 190) there was no time limitation upon the collector's power to reliquidate.

United States v. Campbell, 10 Fed. 816, 818, 822;
United States v. Calhoun, 184 Fed. 499, 502;
Hawley v. United States, 3 Ct. Cust. Appls. 456, 458.

In *United States v. Campbell, supra,* the court said (at p. 818) that the importer

> is liable for any deficiency in payment of the lawful duties, irrespective of the withdrawal of the goods, and, prior to the act of 1874, reliquidation as against him might be had at any subsequent time, and suit brought against him for the deficiency.

And at page 822 the court said:

> At the time of the passage of this act (of June 22, 1874) the government had, under former decisions, been allowed to reliquidate the duties against the importer, without any limitation of time. *Such reliquidation was a necessary preliminary to any remedy for deficiency under a preceding erroneous liquidation.* (Italics ours.)

POINT II.

Section 21 of the Act of June 22, 1874, does not limit the time within which the collector may reliquidate a fraudulent entry.

A time limitation was first put upon the collector's right to reliquidate by section 21 of the act of June 22, 1874. The causes leading to its enactment and what the Congress sought to accomplish thereby have already been stated (pages 13-23, *supra*).

IT IS A STATUTE OF REPOSE.

As to those transactions to which it is applicable, section 21 is in the nature of a statute of limitations.

United States v. Campbell, 10 Fed. 816, 822;
United States v. Leng, 18 Fed. 15, 18;
United States v. Phelps, 17 Blatch. 312, 316, Fed. Cas. No. 16039;
United States v. Calhoun, 184 Fed. 499, 504.

In *United States v. Campbell, supra,* it was said:

> This section of the act of 1874 is, therefore, in the nature of a statute of limitations. It applies to the government and limits its remedies, after settlements, to a period within one year from the date of entry. (Citing *United States v. Phelps,* 17 Blatch. 312, 316.)

In 15 Op. A. G. 122, 123, Attorney General Taft said:

> This act is intended to limit the time in which errors in the liquidation and payment of duties could be corrected.

Section 21 is purely a statute of limitations. It gives to collectors no new powers.

> *United States v. Calhoun,* 184 Fed. 499, 502; affirmed 215 Fed. 709.

IT IS NOT APPLICABLE WHEN THE MERCHANDISE HAS NOT LEFT CUSTOMS CUSTODY.

Discussing section 21, the Board of General Appraisers said in *Paris, Allen & Co.'s case,* G. A. 2411, T. D. 14689:

> It is a well-settled rule that statutes are not to be presumed to make any alteration in the common law further or otherwise than the act does expressly declare, "and in this country the rule has assumed the form of a dogma, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed." (Endlich on Interpretation of Statutes, and cases cited, par. 127.)

In that case the Board of General Appraisers held that section 21 did not apply to merchandise which remained in the custody of the collector. Of like effect was

> *Porter v. Beard,* 15 Fed. 380,

the judgment in which was affirmed in

Porter v. Beard, 124 U. S. 429.

The Board of General Appraisers made a similar decision in

Wyman's case, G. A. 6536, T. D. 27887

IT IS NOT APPLICABLE WHEN THERE IS A PROTEST.

By its very terms it is inapplicable to some merchandise which has passed out of customs custody. It is not applicable when there is a "protest by the owner, importer, agent, or consignee." It has been held that section 21 has no application to protested settlements.

Beard v. Porter, 124 U. S. 437;
Gulbenkian v. Stranahan, 158 Fed. 836;
Kendall v. Lyman, 161 Fed. 652;
Benziger Bros. case, G. A. 6224, T. D. 26898.

In the *Benziger* case General Appraiser Waite, after quoting section 21, said:

> So by the same statute the pendency of a protest removes the limitation.

In *Gulbenkian v. Stranahan,* Hough, D. J., said (p. 838):

> As to the claims enumerated in schedule 3, it appears to me that, a protest having been duly filed, section 21 of chapter 391 of act of 1874, 18 Stat. 190, does not apply.

In *Kendall v. Lyman,* Colt, C. J., said (p. 654):

> Section 21 of the act of June 22, 1874, c. 391, 18 Stat. 190, has no application to this case, because the statute is limited to cases in which no protest has been filed.

The opinion in *Gulbenkian v. Stranahan* was based on remarks at the bottom of page 442 in *Beard v. Porter* (124 U. S. 437), which was an action brought by importers against the collector of customs to recover an excess of duties paid under protest. After entry of the merchandise the duties were liquidated and paid and the goods delivered. More than one year after the dates of entry, the collector made a new liquidation and demanded additional duties. The importers paid the additional duties and protested against the second liquidation. Then they sued to recover the excess of duties paid after the second liquidation. The complaint alleged that the second liquidation was made after the payment of the duties as first ascertained, after the goods had been delivered to the importers, and more than one year after the dates of entry; and that the second liquidation was illegal and void. By his answer the collector set up the second liquidation. He made no allegation that there was fraud in the case. The importers demurred to the answer, contending that the answer did not set up sufficient grounds to avoid the final and conclusive effect of the first liquidation. The court below sustained the demurrer. On appeal this court was of opinion that the first settlement of duties was conclusive upon the United States. From that part of the opinion which is

printed just below the middle of page 442 it appears that the court was of the opinion that (because of section 21, act of 1874, which was discussed at length in the briefs) the collector was without power to reliquidate other than at a "time within a year from the date of the original entry." At the bottom of page 442 the court took up the suggestion "on the part of the defendant (the collector), that the settlement of duties spoken of in section 21 of the act is made final and conclusive upon all parties only in the absence of protest by the owner or importer, and that in this case a protest was filed"—the protest to which the defendant referred being the protest against the *second* liquidation. The court then said:

> But the protest referred to in section 21 is, manifestly, a protest against the prior liquidation or settlement of duties which the section proposes to declare to be final and conclusive after the expiration of one year from the time of entry. No protest against that liquidation has been made.

The court approved the principle that the existence of a proper protest excludes a settlement of duties from the operation of section 21; but held that in the case then at bar the principle of exclusion was inapplicable because there was no protest against the original settlement of duties.

In *United States v. Leng,* 18 Fed. 15, 18, the court said:

> By the words "in the absence of protest" the statute means the absence of any exist-

ing protest pending and in force at the expiration of the year or at the date of the proposed reliquidation; that is, a protest upon which proceedings are then pending, or which may serve as the basis of some future appeal to the secretary, or some suit in the courts.

See also

Cassel v. United States, 146 Fed. 146.

IT IS NOT APPLICABLE WHERE THERE IS FRAUD.

That the statute has no application to transactions tainted with fraud was early recognized by the courts. In *United States v. Phelps,* 17 Blatch. 312, Judge Blatchford said:

> But, by section 21 of the act of 1874, a limitation is imposed on such power, so that, after the entry of goods, and after the liquidation and payment of duties on them, and after the delivery of the goods to the importer, such settlement of duties, *if there be no fraud and no protest by the importer,* is, after one year from the entry, final and conclusive even as respects the Government. (Italics ours.)

In *United States v. Leng,* 18 Fed. 15, 18, it was said that section 21

> declares only "that such entry and passage free of duty, and such settlement of duties, shall * * * be final and conclusive upon all parties"; that is, if no proceeding be taken by either party to avoid the effect of "such settle-

> ment of duties," the settlement so made shall, after one year, *in the absence of fraud or protest*, be final and conclusive. (Italics ours.)

In *United States v. Calhoun*, 184 Fed. 499, it was said (at p. 504):

> Section 21 of the act of June 22, 1874, was merely a statute of limitation, and *but for the exception as to fraud would have concluded the collector from reliquidating at the end of the year.* (Italics ours.)

In *United States v. Fox*, 53 Fed. 531, 536, the court said:

> Fraud, or the pendency of a protest which tends to retard the proceedings, extends the time.

In *Benziger Bros. case*, G. A. 6224, T. D. 26898, the Board of General Appraisers quoted section 21 and then said:

> It is thus seen that in case of fraud the one-year limitation provided above does not operate.

See also

> *United States v. Schwartz*, 3 Ct. Cust. Appls. 24, 28.

In *United States v. Federal Sugar Refining Co.*, 211 Fed. 1016, 1018, the court said:

> If fraud be shown it may be inquired into. * * * Pursuant to section 21, supra, the

> original liquidations and payments of duties were final and conclusive upon all parties *in the absence of fraud. If fraud be proved, then they are not conclusive.* (Italics ours.)

On the first trial of the protest involved in suit No. 67 the Board of General Appraisers said:

> Under the provisions of section 21 of the act of June 22, 1874 (18 Stat., 190), the collector is limited in the reliquidation of an entry to one year after the liquidation (*sic*), *except* where there has been a protest filed or *where fraud exists.* * * *
>
> Under the operation of this section, therefore, *the collector can reliquidate an entry after the expiration of one year from the original entry* only when there has been a protest filed, or *when there has been fraud in the original entry.*
>
> *Vitelli's case,* G. A. 7418, T. D. 33115.

In 1895 the Board of General Appraisers held that fraud in an entry prevented finality attaching to the collector's original liquidation. The two entries in that case had been liquidated Sept. 14, 1892, and Jan. 11, 1893, respectively. The collector reliquidated in October, 1914. The importers contended that the original entries were final and conclusive because of section 21, act of June 22, 1874. The board held that that statute did not attach because of fraud in the transaction.

Ford's case, G. A. 3167, T. D. 16338.

In *Carney & Johnson's case*, G. A. 3842, T. D. 17967, the Board of General Appraisers had before it another case of a reliquidation made more than a year after entry upon the ground that protestants had been guilty of fraud in making the entry. The sole question tried before the board was as to the existence of fraud. The board found that there was no fraud and consequently held that the reliquidation was void.

THE FRAUD WHICH PREVENTS THE APPLICATION OF THE STATUTE IS NOT LIMITED TO THE FRAUD OF THE IMPORTER HIMSELF.

Ford's case, supra, decided another point which is of importance in the cases at bar. In that case empty grain bags had been entered by Ford, Agent, and passed free of duty upon Ford's oath that the bags had been exported from the United States on the ship Kinkora, his oath being based on statements made by Rice & Co. of Liverpool, England. It was afterwards established that the bags had not been exported on Kinkora. Upon the trial of his protest Ford urged that he was innocent of the deception practiced on him by Rice & Co. and that he ought not to be prejudiced by the untrue representations of the Liverpool consignors. The board held that the fraud or deception contemplated by section 21 attached to the goods and the entry thereof; and that there could be no division of responsibility and no exoneration therefor to be apportioned among the parties instrumental therein.

Conclusions as to the Effect of the Act of 1874.

The inevitable conclusion from an examination of the foregoing authorities is that section 21 of the act of June 22, 1874, is inapplicable where fraud exists; that where fraud exists there is no limitation upon the time within which a collector may reliquidate; and that it is immaterial whether the fraud be that of the importer himself or some other person, as, for example, a Government weigher. Therefore, before petitioners' claims that the collector's decisions were "not made pursuant to the provisions of the statute" and were "not made within the period prescribed by the statute" can be sustained, it must be made to appear as a fact that there was an "absence of fraud."

POINT III.

The Act of 1874 did not shift the burden of proof on the trial of a protest against a reliquidation made more than a year after entry.

As soon as the collector had reasonable ground to believe that dutiable merchandise had been imported without the payment of duties, it was incumbent upon him to institute proceedings to collect the duties thereon. As the Court of Customs Appeals said (R. 41-42, suit No. 67):

> * * * how can we refuse to hold a suspiciously persistent variance in weights of these importers' goods, coupled with the fact of their billing them on sale at much greater weights, sufficient evidence of fraud to warrant and require the collector to reassess the duties, whereupon * * * the importer, if the goods are in customs custody, receives notice and must pay the increased duties in order to protest and try his case before the board, with appeal to the courts. But if the goods are not in custody, upon receipt of the required notice he can either pay the increased duties, protest, and litigate as before, or refuse to pay and defend action in the United States District Court. * * * Wherefore, the court is of the opinion that the evidence before the collector was sufficient in due observance of his official duty to *require* action. What, may be asked, would any merchant do upon discovery that goods delivered to him were thus

> presistently materially underweighed as paid for? (Italics copied from original.)

The then existing record disclosed no unpaid duties, as all duties assessed upon the original liquidations had been paid. As long as that record existed, no suit for unpaid duties could be instituted. Only the collector himself could abrogate the original liquidations; and he could abrogate it only by making a new liquidation. (See pages 30-31, *supra*.)

In the absence of protest, the merchandise having passed out of customs custody, the collector could reliquidate only in case there was fraud in the original transaction. If there were fraud, he had a right to reliquidate. If there were no fraud, he did not have the right. His power or lack of power depended upon the existence or non-existence of fraud. But how was the existence or non-existence of fraud to be determined?

In *United States v. Federal Sugar Refining Co.*, 211 Fed. 1016, the court disapproved a contention that the collector could make a final and conclusive finding of fraud, saying (p. 1018):

> Who is to determine the existence of fraud? If the collector be the sole and final arbiter, he is invested with autocratic powers. At any time he may, by the mere assertion that he has found an entry which is fraudulent, reliquidate it, without a particle of proof and the victim is remediless.
>
> * * * * * * * *
>
> The real issue upon which recovery depends is fraud in the original weighing, and the

plaintiff should prove that fraud to the satisfaction of the court and jury.

In *United States v. Sherman*, 237 U. S. 146, 157, the court said:

> The determination of the question as to whether there was fraud involved an exercise of the judicial rather than the executive function.

In the *Sherman* case, *supra*, questions certified by the Circuit Court of Appeals involved "an inquiry as to whether the collector of customs, after the expiration of one year, can make a finding of fraud and thereupon make a reliquidation of duties which is final" unless the importer by payment and protest secure the right to a hearing both "(1) on the finding of fraud, and (2) on the correctness of the new assessment." This court held that the collector has no such power. Speaking through Mr. Justice Lamar, the court said (p. 157):

> But there is no provision as to the method in which, or the tribunal before which, the existence of the nullifying fraud can be determined. The silence of Congress on that subject, however, can not be construed as the expression of an intent to enlarge the administrative function of the collector into power and jurisdiction to declare that, years before, there had been fraud in the procurement of the order liquidating duties on goods removed.

In the *Sherman* case the Government made another erroneous contention. It argued that "only the statutory method of defense, by protest and payment, is available to the importer"; but that contention has been effectually laid at rest.

> *United States v. Sherman*, 237 U. S. 146, 154 *et seq.*

The contention made in the third point of petitioners' brief (pp. 22-26) is expressed near the beginning thereof as follows:

> It is contended here however, that the *Shermans & Sons case, supra.* has settled finally, that Congress has thus far, nowhere authorized "the collector to make findings of fraud."

The Government does not contend in this court, and the record shows that it did not contend below, that the collector either made a legal finding of fraud or had power to make such a finding. Therein is the crucial difference between the instant cases and *United States v. Federal Sugar Refining Company*, 211 Fed. 1016, and *United States v. Sherman*, 237 U. S. 146. In those cases the Government erroneously contended that the collector had such a power. Here the Government contends that if fraud existed the collector had power to reliquidate, leaving it for a proper tribunal in an appropriate proceeding to determine the question as to whether there had been fraud. The Customs Court pointed out several times that there is no conflict between what it decided in the instant cases and what was decided in the two cases just cited (R. 44, 46, and 48, suit No. 67).

As to what the collector did do in the premises we quote from the opinion below (R. 31, suit No. 67):

> Bearing in mind the law of the case as concluded let us examine the records before us. The court is of the opinion that much confusion has ensued from an inaccurate estimation of the exact import of the decision of the collector. Great stress has been laid upon the collector's "findings" of fraud and his "decision" as to fraud. *Let it be definitely understood at the outset that the collector herein neither made nor attempted to make either a "finding of fraud" nor a "decision" that there was fraud.* In this case, as in all such, the sole and only legal function of the collector is to decide as to the *rate* and *amount* of the accrued duties, and in this case the *only thing* decided or found by the collector on reliquidation was that the amount of the duties previously liquidated was erroneous, and that a different and greater declared amount of duties was due. That much was decided. That much the law empowered him to decide. Beyond that he neither *decided* nor found nor stated he decided or found anything further. (Italics copied from original.)

As to the garlic and chestnuts there were only two questions, viz., (a) as to weight and (b) as to the existence of fraud. So far as the computation of the amount due to the Government depended on weight the collector had exclusive jurisdiction. Further, unless he had acted, the Government could not have recovered the unpaid duties.

The collector took the only course which was open to him. He declared the original liquidations void and proceeded to reliquidate, leaving it for the proper tribunal to determine whether the original liquidations were vitiated by fraud, if importer should question his right to make the reliquidations. If a judicial tribunal should determine that there had been no fraud, then his reliquidations would be of no effect; but if it should be determined that there had been fraud, his reliquidations would determine the amount of duties.

It must be borne in mind that the collector had no direct method of collecting the unpaid duties. He notified petitioners of his reliquidations, as he was required to do by the Customs Regulations then in force. He could not issue execution or other process against petitioners; and the imported merchandise had long since passed beyond his reach. If the petitioners did not come forward and make payment, the Government's only remedy was a suit to recover the difference between the amount of the new assessment and the amount already paid. Not only was the collector required to notify petitioners; but, had they not paid, ten days after the notification he would have instructed the district attorney to proceed for the recovery of the duties. (Art. 1037, Cust. Reg. 1908.)

Had petitioners remained passive, doubtless the Government would have sued, as it did in the *Federal Sugar Refining Co.* and *Sherman* cases, *supra*. In such a suit petitioners could have raised the question as to the existence of fraud.

Petitioners elected to avail themselves of the statutory remedy. Instead of awaiting suit by

the Government, they paid the duties and protested. Thereby they raised not only the question as to fraud but also a question as to the weight of the garlic and chestnuts. They could have raised the question as to weight in no other way. (See pages 29-30, *supra*.)

The protests raised an issue as to fraud by their allegation that "the importers deny that there was any fraud connected" with the original entries. By that allegation petitioners asserted that the protested entries were among that limited class of entries as to which there is a time limitation upon the collector's power to reliquidate. Petitioners alleged that they were entitled to the benefit of the statute of repose enacted in 1874 in derogation of the collector's power.

For convenience we here quote the head note of the first point in petitioners' brief:

> The rule of evidence which determines what proof of fraud is necessary in order to annul a liquidation made beyond the period of limitation found in Act of June 22, 1874, is the same in a hearing before the U. S. Board of General Appraisers on a protest, as in a suit in any other judicial tribunal.

There is no rule of evidence involved in these cases. Neither is there in the instant cases any question as to either the quantity or the quality of proof of fraud necessary for the Board of General Appraisers to annul the collector's original liquidations. Neither was the board asked nor had it power to annul the original liquidation. Only the collector himself could do that. (See pages 30-31, *supra*.)

The questions before the board were those raised by the protests against the collector's new liquidations. The protests claimed, in effect, (a) that the collector had liquidated on the wrong weights and (b) that the collector had no power to reliquidate.

But though not abandoning the claim that the collector was without power to reliquidate, petitioners' brief does not seem to urge that contention strongly. At the bottom of page 33 the brief says that the collector "had lost his remedy," but the brief thereupon says it does not contend "that the powers he (the collector) exercised were beyond his jurisdiction." Whatever the point may be, the brief makes little argument in support thereof.

In section 9 (pp. 5-7) the brief urges that at the trial the *onus probandi* shifted to the Government; and in section 18 (p. 12) the brief contends that petitioners were entitled to the presumption of innocence "with the burden on the Government to prove fraud." On page 6 the brief quotes with approval from the board's opinion on the first trial wherein the board recognized "the ordinary rule that the action of a public officer is presumed to be correct." But the board held that an exception should be made "upon the universal principle of law that fraud is never presumed" and upon the further principle that no man should be required "to prove that he was not guilty of a criminal offense."

Is there a universal principle of law that fraud is never presumed? In the tariff act in force when these protests were filed there was a provision that if the appraised value of imported merchandise should exceed the value declared on entry by more than 75%, the entry should be "held to be presump-

tively fraudulent" (36 Stat. 96), which provision has been brought forward into the present tariff act (38 Stat. 184). Possession of merchandise brought into the United States contrary to law is presumed to be fraudulent (R. S. 3082). In suits or proceedings to recover merchandise seized pursuant to any act regulating the collection of duties, the burden of proof lies on the claimant: provided probable cause is shown for the prosecution (R. S. 909; 36 Stat. 101; 38 Stat. 189). Evidence of the giving of any money or thing of value to a customs officer while in the discharge of his duty would seem to put on the giver "the burden of proving that such act was innocent and not done with an unlawful intention" (36 Stat. 103; 38 Stat. 191).

While the protection of the revenue calls for stringent statutes, yet the courts are not reluctant to impose heavy burdens on parties. A contract between a trustee and his *cestui que trust* will be permitted to stand only when the trustee affirmatively shows that there was no fraud (39 Cyc. 300).

In *Munson v. S. G. & C. R. R. Co.* 103 N. Y., 59, it was held that:

> A trustee cannot, in his representative capacity, purchase property in which he is personally interested. The law does not stop to inquire whether such contract of purchase was fair or unfair. It stops the injury when the relationship is disclosed by setting aside the transaction or refusing to enforce it at the instance of the party whom the trustee represents.

Further, taking the affirmative upon the trial would not necessarily have required petitioners

to prove their own innocence. If petitioners had proved that the Government weigher had properly weighed the merchandise, they would have sustained the burden.

Ordinarily on the trial of a protest before the Board of General Appraisers the burden is on protestant to prove the material allegations of his protest. In *Arthur v. Unkart,* 96 U. S., 118, 122, the court said:

> Both the sheriff and collector have power to act in the first instance upon the question in dispute, and he who insists that such action is in violation of law *must make the proof to show it.* (Italics ours.)

The burden is on an importer of overcoming the presumption of a legal collection by proof that exaction of duties was unlawful.

Erhardt v. Schroeder, 155 U. S., 124, 130.

The acts of a public officer on public matters, within his jurisdiction, are presumed to be legal, till shown by others to be unjustifiable.

Wilkes v. Dinsman, 7 How. 88, 130;
Strother v. Lucas, 12 Pet. 410, 437-438;
Townsend v. Jemison, 7 How. 706, 720;
Whitcomb v. Spring Valley Coal Co., 47 Fed. 652, 655.

Where in order that a public officer may act it is essential that a certain state of facts should exist, there is a presumption of the existence of those facts.

United States v. Loeb, 99 Fed. 723, 732 and cases there cited.

When a collector reliquidates more than a year after entry there is no more reason why he should prove his right to reliquidate than there would be if he had reliquidated within the year. There is nothing in the law to differentiate the two classes of cases.

Under petitioners' theory the mere filing of their protests, without any proof in support thereof, entitled them to a decision reversing the collector's decisions. The Government maintains that no protest can be sustained until there be either some concession by the Government or proof in support of the protest.

Petitioners had invoked the shelter of a statute of repose. On them rested the burden of establishing their plea. It was for them to prove that as to their entries the collector was without power to reliquidate.

19 *Am. & Eng. Enc. Law, 2nd Ed.*, 332

As was said by the Court of Customs Appeals on the first appeal:

> To obtain the benefit of the provision for finality of the first liquidation, in such a statute, it seems that any person who seeks to impeach a reliquidation must aver and prove the non-existence of the statutory exceptions. This rule is fully set forth and discussed in Lewis' Sutherland Statutory Construction (vol. 2, sec. 351).
>
> *United States v. Vitelli*, 5 Ct. Cust. Appls. 151, 156.

Statutes to prevent frauds upon the customs revenue are considered as enacted for the public good and to suppress public wrong. Therefore, despite their harshness, they are not to be construed in favor of importers (as penal laws are construed in favor of defendants); but instead they are to be fairly and reasonably construed so as to carry out the objects for which they were intended.

United States v. Stowell, 133 U. S. 1, 12;
Ten Cases of Opium, 23 Fed. Cas. 840, 843;
Taylor v. United States, 3 How. 197, 210;
Cliquot's Champagne, 3 Wall. 114, 145.

In *Taylor v. United States, supra,* it was held that

> Revenue-laws, for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they impose a penalty. But they ought to be so construed as most effectually to accomplish the intention of the legislature in passing them, instead of being construed with great strictness in favor of the defendant.

That the burden upon petitioners involved the proving of a negative does not affect the question.

Arthur v. Unkart, 96 U. S. 118, 122;
Wigmore's Evidence, Sec. 2486.

Comey & Johnson's case, G. A. 3842, T. D. 17967, seems to be pertinent. The collector had reliquidated more than a year after entry. The sole ques-

tion to be determined by the Board of General Appraisers was whether the importers had been guilty of fraud in making entry. The board's opinion indicates that the importers took the burden of proving that there was no fraud in the transaction.

In the cases at bar petitioners knew exactly what they had to meet. By simply proving that the original liquidations had been based on correct weights, they would have established both (a) the non-existence of fraud and (b) the collector's lack of jurisdiction to reliquidate. As the Customs Court said on the first appeal (5 Ct. Cust. Appls., 158):

> They cannot claim ignorance, uncertainty, or embarrassment as to what the issue was, and they, better than anyone else, should have knowledge of the facts necessary to meet the same. They were not entitled to a hearing before the collector upon this question, but could get their day in court by appealing from the reliquidation to the board, as they have done.

As was said by this court in *Bartlett v. Kane*, 16 How. 263, 274:

> A construction, which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing.

POINT IV.

If the Act of 1874 shifted the burden of proof to the Government, that burden is met by the evidence in the record.

The Court of Customs Appeals has jurisdiction

> to review by appeal * * * final decisions by a board of general appraisers in all cases as to the construction of the law *and the facts* respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board and all appealable questions as to the laws and regulations governing the collection of the customs revenues: * * *
>
> *Sec. 195, Judicial Code.*

As directed by the statute (36 Stat. 100), upon the filing of each protest the collector had forwarded to the Board of General Appraisers "the invoice and all the papers and exhibits connected therewith." In 1891, under a similar statute, it was held that it is the duty of collectors, when forwarding protests, to transmit therewith "all reports, testimony, and facts in their possession that may be of service to the board in arriving" at a decision.

Gower's case, G. A. 423, T. D. 10928.

Documents so forwarded are part of the record. Even if anything so forwarded were inadmissible, it is now too late to object thereto.

United States v. Masson, 3 Ct. Cust. Appls. 168, 169.

When these cases were submitted for decision the record was made up of the reports and other documents which the collector had forwarded to the board. What the record disclosed, at least in part, is indicated by the opinion of the Customs Court (R. 14, suit No. 67), which held that "the record contained evidence that negatived the absence of fraud (R. 42, suit No. 67).

This court will not disturb that finding of fact.

Dirst v. Morris, 14 Wall. 484;
Hyde v. Booream, 16 Pet. 169, 176.

If the *onus probandi* were on the Government, the duty imposed on it was satisfied.

POINT V.

The Act of 1874 is not applicable to the instant entries, because there had been no such "settlement" as is contemplated by that act.

Petitioners' liability for duties attached upon the arrival of their merchandise within the limits of the port of entry.

17 *Corpus Juris,* and cases their cited.

As was said in *United States v. Cobb,* 11 Fed. 76, 79, duties

> are due, although the goods have been smuggled, or for any reason have never come to the hands of the customs officers, or the statute proceedings have never been instituted, or through accident or mistake or fraud no duties or short duties have been paid, and the importer is not discharged from his debt by the delivery to him of the goods without payment.

In 1912 the collector assessed duties on large quantities of merchandise which had not even been specified in the entries, and upon which petitioners had not paid duties. The act of 1874 is not applicable. That act applies to only two classes of imported merchandise, (a) that which has "been entered and passed free of duty" and (b) that on which duties "have been liquidated and paid." The excess garlic and chestnuts do not fall within either class.

As the Board of General Appraisers said in *Ford's case,* G. A. 3167, T. D. 16338:

> Section 21 of the act of June 22, 1874, in fixing a time when entry and liquidation should be conclusive, presupposes a regular, legal, and honest entry of the goods; but in the case before us there had been no such entry, and the importers are liable for the duties which accrued to the Government immediately upon the arrival of the goods.

In *Bottomley v. United States,* 1 Story, 135, 3 Fed. Cas., No.1688, where a permit of landing was obtained by false and fraudulent invoices and bribery of a deputy collector, Mr. Justice Story said in an opinion of much learning:

> Here, no true entry, or honest estimate of duties, has ever been made; the duties justly due have never been paid, or secured to be paid. In each case, the transaction is equally a gross and palpable fraud; and the more or less of aggravation in the circumstances cannot change the legal result. It makes no difference in the concoction of the fraud, in legal intendment, whether it defrauds the Government of the whole, or of the half, or of the quarter of the legitimate duties. It is still tainted and putrescent throughout. It is in known violation of law; and no act, done in known violation of law, can be admitted to have any legal validity. It would be a contradiction in terms. Upon the whole, I am entirely satisfied, upon full deliberation, that

> the permit in the present case, if obtained by fraud and collusion between the claimant and the deputy collector (as the jury have found it was), was utterly void, and a mere nullity, and never had any legal existence as a permit.

In the cases at bar there was no "settlement" within the meaning of that term as it is used in section 21 of the act of June 22, 1874.

POINT VI.

The collector assessed duties upon the right weights. But even if he did not, petitioners have not shown upon what weights he should have based his assessments.

In its fifth point petitioners' brief contends that the collector's reliquidations were invalid, on the ground that he adopted weights which had been determined in an illegal manner.

On July 9, 1912, the United States weigher made upon the original weigher's returns in those entries involved in suit No. 67 an indorsement wherein he declared them "void on account of fraud." His endorsement also contained the following: "Reliquidate on basis of corrected returns attached." The attached corrected returns stated the gross weights, the tare, and the net weights of the garlic and chestnuts. Upon the corrected returns were notations telling how he had ascertained the correct weights. (See original papers forming part of the record.)

Thereafter and on July 24, 1912, the collector declared that the liquidations based on the false and fraudulent weigher's returns were void; and he directed that the entries be liquidated on the basis of the corrected returns (R. 6-7, suit No. 67). Thereupon the new liquidations were made.

A similar state of facts exists in suit No. 68.

Both the voided weigher's returns and the new weigher's returns were forwarded to the Board of General Appraisers with the protests. Those documents were a necessary and statutory part of the record before the collector when he made the new liquidations. (*United States* vs. *Bush*, 4 Ct. Cust.

Appls., 519, 520-521; *United States* vs. *Bush*, 5 Ct. Cust. Appls. 127.) It has already been pointed out herein that it was the collector's duty to forward those documents to the Board of General Appraisers and that they became and were a part of the record before the board (pages 55-56, *supra*).

Petitioner's brief seems to contend that the Government was bound by the original weigher's returns. In answer, it is pointed out that while the statutes accord finality and conclusiveness to the decisions of appraising officers (26 Stat., 137; 36 Stat., 99), yet there is nothing in the statute which accords finality to any other of the various returns which the collector considers when determining the amount of duties.

Further, a fraudulent weigher's return is, as was said by Mr. Justice Story in *Bottomley* vs. *United States*, cited on page 58, *supra*, "tainted and putrescent throughout" and cannot "be admitted to have any legal validity."

Also see

Johnson vs. *United States*, 5 Mason, 425, 13 Fed. Cas., 7419.

That returns of weighers may be amended by permission of their superior, the surveyor, is recognized. (Arts. 1484 and 1440, Cust. Reg., 1908; *Mauger & Avery's case*, G. A. 1786, T. D. 13489.) As was said by the court below: "The power to amend implies a power to vacate the previous return, which was herein expressly done" (R. 36, suit No. 67).

It is fundamental that duties should be taken on the quantity actually imported. Where there are irregularities in the weighing, the weigher's returns

may be set aside and the quantity determined by evidence aliunde.

American Sugar Refining Co.'s case, G. A. 6620, T. D. 28249;
Sears v. United States, 3 Ct. Cust. Appls. 447;
United States v. Gage, 1 Ct. Cust. Appls. 439.

The collector assessed duties on the weights showed by the corrected returns. As those returns were in the record and petitioners made no effort to have them expunged, the court below had a right to consider them.

United States vs. *Masson,* 3 Ct. Cust. Appls., 168.

Presumably the corrected returns showed the actual weights of the garlic and chestnuts. It is immaterial how the weigher arrived at those weights. Until it is shown that the collector assessed duties on incorrect weights his decision cannot be set aside.

While petitioners' counsel stated at the trial that he had thought of producing evidence as to the weights, yet he concluded not to do so (R. 7, suit No. 67). So that the corrected weigher's returns are the only evidence as to the actual weights which the record contains. In a case where an importer contends that duty has been taken on incorrect weights, it is incumbent upon him to offer proof as to the correct weight.

Ford's case, G. A. 3167, T. D. 16338.

If petitioners had established that the collector took duties on too great a quantity, that alone would not have entitled them to a judgment setting aside the collector's assessments. As was said by the Court of Customs Appeals in *Benjamin Iron and Steel Co.* vs. *United States,* 2 Ct. Cust. Appls., 159, 160:

> The burden was on the importer to show not only that the classification to which he objected was erroneous, but that the classification which he claimed in his protest was correct. Fisk vs. Seeberger (38 Fed. Rep., 718-719); Walker vs. Seeberger (38 Fed. Rep., 724, 726), Strakosh vs. United States (1 Ct. Cust. Appls., 360; T. D. 31453), In re Herter Bros. (53 Fed. Rep., 913); Davies vs. Arthur (7 Fed. Cas., 43).

CONCLUSION.

The judgments of the Court of Customs Appeals should be affirmed.

BERT HANSON,
Assistant Attorney General.

April, 1919.

Appendix A.

(5 Ct. Cust. Appls., 151.)

United States v. *Vitelli & Son* (No. 1084).

1. SECTION 21, ACT OF 1874.

There is no limitation fixed by Section 21, Act of 1874, except a limitation which arises only in the absence of fraud and in the absence of protest. So far as the section contains implied authority for reliquidation, it imports the rights to reliquidate in case of fraud and in case of protest after the lapse of one year equally with the right so to reliquidate within the period of a year.

2. RELIQUIDATION—FRAUD—BURDEN OF PROOF.

The collector found the existence of fraud as a fact. It was not incumbent on the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation by the collector on the ground of fraud. In this case, as in others, the burden was placed on the importer to show by proof that the collector's action was erroneous.

United States Court of Customs Appeals, February 10, 1914. Appeal from Board of United States General Appraisers, G. A., 7418 (T. D. 33115).

[Reversed.]

William L. Wemple, Assistant Attorney General, for the United States.

Albert M. Yuzzolino for appellees.

James M. Beck and *Joseph W. Carroll, amici curiae.*

Before Montgomery, Smith, Barber, De Vries, and Martin, Judges.

BARBER, Judge, delivered the opinion of the court:

In 1905, 1906, and 1907, 14 separate entries were made by the importers of chestnuts and garlic. Liquidation was had by the collector and the duties imposed paid. On July 8, 1912, an order was made by the collector stating that satisfactory evidence having been produced showing that the returns of weights on the importations in question were false and fraudulent, the liquidations were declared void and a reliquidation directed on the basis of the corrected returns made by the United States weigher. The reliquidation was had and protest was filed with the collector and an appeal taken to the Board of General Appraisers, which sustained the protest on the ground that in the hearing had before the board the Government had not supported the claim of fraud by proof, and that it was incumbent upon the collector to establish this fraud by competent evidence, and that a presumption of fraud could not arise from the official action of the collector in reliquidating the entries. From this decision the Government took an appeal to this court.

Subsequently to the hearing a brief has been filed by permission of counsel intervening *amici curiae*, and the contention is made in this brief that while the Board of General Appraisers reached the correct conclusion, it was in error in assuming that the collector, in reliquidating after the lapse of a year, acted in the discharge of a right granted or duty imposed by law, and that no reliquidation can be had after the lapse of one year.

The board construed section 21 of the act of 1874 as authorizing a reliquidation at any time during one year from the time of entry, and as also au-

thorizing a reliquidation after the lapse of one year in case of fraud or in case of a pending protest.

This section provides:

> That whenever * * * duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner * * * such entry and passage free of duty and such settlement of duty shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

This section is to be construed in connection with subsection 14 of the act of August 5, 1909, which provides:

> That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within 15 days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within 15 days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give

> notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. * * *

This section was enacted in lieu of section 2931 of the Revised Statutes, which, as it relates to the question here involved, was in substantially the same terms. That section provided that—

> On the entry of any * * * merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid * * * on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner * * * importer, consignee, or agent of the merchandise * * * shall, within 10 days after the ascertainment and liquidation of the duties by the proper officers of the customs * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within 30 days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury.

These two provisions were first considered by the courts in 1879, and in an opinion by Blatch-

ford, Circuit Judge, in United States v. Phelps *et al.* (17 Blatch., 321; Fed Cas. No. 16039), it was said:

> By section 2931 of the Revised Statutes the decision of the collector, in liquidating duties, as to the amount of duties on imported goods, is made final and conclusive against all persons interested in such goods, unless notice in writing of dissatisfaction with such decision is given to the collector, by the importer, within 10 days after the liquidation, and unless within 30 days after the liquidation there is an appeal by the importer from the liquidation to the Secretary of the Treasury. Such liquidation is not made final and conclusive as against the United States. There is nothing in the section which forbids a reliquidation or a new decision by the collector, even after the payment of all the duties fixed by a proper liquidation, or even after the refunding of money deposited beyond the amount of duties so fixed; or which forbids a new decision by the collector as to the law on the same facts, or a new decision as to facts, based on additional or new or different facts. This view is confirmed by the enactment of section 21 of the act of June 22, 1874 (18 Stat., 190), which is as follows:

> Whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

> This provision was in force when the transactions in this case took place. It applies to the United States. The expression "all parties" includes the United States. By section 2931 of the Revised Statutes, there was no limitation imposed on the power of the collector to reliquidate, when such reliquidation was in the interest of the Government. But by section 21 of the act of 1874 a limitation is imposed on such power, so that, after the entry of goods, and after the liquidation and payment of duties on them, and after the delivery of the goods to the importer, such settlement of duties, if there be no fraud and no protest by the importer, is, after one year from the entry, final and conclusive, even as respects the Government. In the present case, the suit was brought before the one year expired. The collector, therefore, had power to make the reliquidation of July 20, 1878. * * *

This case has not only been frequently followed, but the paragraph providing as to cases in which the first liquidation of the collector shall be final has been twice reenacted and is now embodied in subsection 14 above quoted.

The cases which recognize and follow the case of United States vs. Phelps are some of them referred to in Hawley & Letzerich v. United States (3 Ct. Cust. Appls., 456; T. D. 33037), and are collected in the case *In re* Forbes & Wallace (T. D. 23655) there cited. See also Louisville Pillow Co. v. United States (144 Fed., 386) and United States v. R. R. Co. (151 Fed., 545).

The effect of these decisions, and particularly in view of the reenactment of the provisions now embodied in subsection 14, is to establish the rule that the first liquidation of the collector is not conclusive upon the United States; that in the absence of limitation a reliquidation may be had at any time; and that the only limitation is contained in section 21 of the act of June 22, 1874, which by implication also recognizes the right to reliquidate after the first liquidation is had.

The cases in which the question had arisen were cases in which the liquidation occurred within the one year's period fixed by the statute of 1874. But it is obvious that the power to reliquidate is precisely the same in any one of the three instances mentioned in that section. The limitation is that reliquidation shall not occur after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee. So if a reliquidation may be had at any time within one year, by the same authority if fraud exists or if a protest is had, a reliquidation may take place after the year. Or to state it in another way, there is no limitation fixed by Section 21 except a limitation which arises *only* in the absence of fraud and in the absence of protest. So far as Section 21 contains an implied authority for reliquidation, it is equally as forceful in importing the right to reliquidate in case of fraud and in the case of protest after the lapse of one year as it is in importing the right to so reliquidate within the period of one year.

This brings us then to a consideration of the question whether when a reliquidation is had after

one year it is incumbent upon the Government in case of an appeal to establish that there was in fact fraud before a reliquidation can be justified. That the right to recover these duties against imported merchandise vested in the Government upon the importation is too well settled to require extended discussion. Upon this point see the cases cited, *supra*. And that the power of the collector to reliquidate existed prior to the act of June 22, 1874, is determined by cases cited. See particularly United States v. Calhoun (184 Fed., 501).

In this case the collector reports that—

> Evidence was produced to show that the returns of the United States weighers were false and fraudulent, hence the liquidations were declared void and reliquidations were made on the true weights, as found on the amended returns of the United States weigher.

The briefs of the importers and *amici curiae* concede that if the collector proceeded within the authority conferred upon him by statute his acts carry with them the presumption of correctness, but they urge that the collector has no authority to find that fraud exists before he can reliquidate, and hence when his reliquidation is challenged by protest, as in this case, that it is incumbent upon the Government at the hearing before the board to go ahead and establish the existence of the fraud. In other words, they treat the case much as if the appeal here were an appeal from the finding of fraud rather than the reliquidation. Upon this theory, however, until fraud were established it is manifest there could be no reliquidation whatever,

because if the collector is without power to find fraud he can in no case reliquidate on that ground, unless and until it is otherwise found, for which procedure the statute expressly or impliedly makes no provision. In this view there is really no reliquidation here to be challenged by protest.

The conduct of the importers, however, negatives this theory, because they have paid the reliquidated duties under protest, thereby taking the position that there has been a reliquidation, and are now prosecuting a protest for the purpose of having the same set aside and the moneys refunded.

We think it cannot be said that this differs from other cases of an appeal from a liquidation of the collector in this respect. The very authority to liquidate, which resides in the collector alone, implies an authority to ascertain certain facts—for instance, to determine whether the goods were imported, whether entitled to free entry or dutiable, each of which as well as other findings are necessarily implied in the liquidating act and all of which, if protested against, may be challenged upon the hearing of the protest. The entire subject matter of reliquidation is within his jurisdiction, and the power to determine the existence of the facts necessary to warrant the same inheres in him. Whether he will reliquidate or not is a matter in which he must exercise his discretion. It will not be presumed that he will without investigation wantonly and without cause exercise the power, but it will be presumed, when the same has been exercised, that it was warranted, and unless appeal is given from such decision, as it is in this case, such action is conclusive and by the statute is made so unless appealed from.

That this may involve the proving of a negative on the part of the importers does not affect the question, for in Arthur v. Unkart (96 U. S., 118), a leading authority upon the proposition that the acts of public officers acting within the scope of their authority are presumed to be correct, it is clearly recognized and cases are cited to the proposition that the support of a negative allegation often devolves upon parties who challenge the correctness of such official action.

It must always be kept in mind that in this case the statute makes no provision for the finding by any tribunal other than the collector of the existence of facts which warrant his action, and that in this case he has not, as is ingeniously argued, simply *claimed* or *asserted* that fraud exists, but, on the other hand, he has, as he must have done, *found* the existence of fraud. The position taken by both importers and *amici curiae,* if adopted, really results in a judicial annihilation of the settled doctrine of the law that the acts of officers of the law upon a subject of which they have jurisdiction are presumed to be correct.

This case is not the institution of a suit by the importers in a court of common-law jurisdiction, but is a special proceeding authorized by statute for the purpose of challenging the correctness of a decision of the collector, which decision is declared final unless appealed from. The importers have no constitutional right to review this decision in the courts. The right to do so is a favor granted to them by the United States.

As was said in the case of Arnson vs. Murphy (115 U. S., 579, 584):

> The right of action does not exist independently of the statute, but is conferred by it. * * * But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested unless certain things are done. The mere exaction of the duties is, necessarily, the decision of the collector, and on this being shown in any suit it stands as conclusive, till the plaintiff shows the proper steps to avoid it.

But, if it be assumed that the ordinary rules of pleading observed in civil causes may be invoked here, it should be noted that the statute, Section 21, *supra*, excepts from the operation of its limiting provisions the following cases: First, where the year has not elapsed from the payment of the original liquidated duties and the delivery of the merchandise; second, where there is fraud; and, third, where protest has been made. In other words, in the presence of any one of these conditions the bar of the statute does not apply, and their non-existence is necessary to permit the liquidation to be final and conclusive upon all parties.

To obtain the benefit of the provision for finality of the first liquidation, in such a statute, it seems that any person who seeks to impeach a reliquidation must aver and prove the non-existence of the statutory exceptions. This rule is fully set forth and discussed in Lewis's Sutherland Statutory Construction (vol. 2, sec. 351). See also Arnson v. Murphy, *supra*.

The importers here evidently recognized its applicability, because their protest expressly denies the existence of fraud.

The question may be somewhat novel, as it is unusual to require one to prove the absence of fraud which may be imputed to him. The existence of fraud, however, is only incidental to the question as to the correctness of the reliquidation, and upon that issue the importers meet and must overcome the presumption that it is correct. Tested by the rule of pleading above mentioned the importers have failed to bring themselves within the same by failing to prove their averment that there was no fraud.

There is also another view of the case not discussed by counsel which ought not to be disregarded or overlooked. The original and amended weigher's returns are a part of the files, were before the board, and are before this Court. These amended returns and the reliquidation thereon relate only to garlic and chestnuts, while some of the entries, 14 in number, cover in addition other merchandise. Upon these corrected weigher's returns are written statements to the effect that the greater part of the reliquidated merchandise had been traced from the importers to various persons who had weighed the same and kept a record of such weights, with which the weights shown in the corrected returns substantially correspond; that in some instances the merchandise had been paid for upon the basis of such weights; and that in at least one case the importers had billed the goods at 46,253 pounds, which was some 3,500 pounds greater than the weight thereof as originally returned by the weigher. We have examined some of the files relating to all these 14 entries, and therefrom it appears that the corrected re-

turns increase the weights above those originally returned in amounts varying from 1,000 to 16,000 pounds in each of such entries.

We doubt if it can be said that these facts are not evidence of fraud, which, unexplained, would seem to import a deliberate and, for a time at least, successful attempt to pass many thousand pounds of merchandise through the customs without paying duty thereon. While it has been, as we understand, uniformly held that the weigher's return is conclusive upon the collector and the Board of General Appraisers where he has acted within the rules of law prescribing his duties, yet if he has fraudulently underweighed merchandise he has not so acted, but has violated not only the law but his statutory oath of office, and his weighing becomes a nullity. For an authority reviewing decisions on this subject see G. A. 6620 (T. D. 28249). It is also there held that where the weight is void or illegal in a particular case the actual weight for dutiable purposes may be determined by evidence *aliunde*.

In the case at bar the first weights have by the proper customs officers been found fraudulent and void, and amended certificates of weight with indorsements showing how the same were ascertained have been filed in the case and submitted to the collector The collector has satisfi.ed himself, as he says, upon *evidence produced* that the first weights were fraudulent and has reliquidated upon the basis of the weigher's amended returns. These returns and amended certificates are a part of the case and would seem to be sufficient, if it were necessary to show fraud in the first instance,

to support the judgment of reliquidation. Thereby importers were put upon notice as to the particular fraud found. They can not claim ignorance, uncertainty, or embarrassment as to what the issue was, and they, better than anyone else, should have knowledge of the facts necessary to meet the same. They were not entitled to a hearing before the collector upon this question, but could get their day in court by appealing from the reliquidation to the board, as they have done.

We are of opinion, for the reasons hereinbefore set forth, that it was not incumbent upon the Government in the first instance to introduce evidence tending to support the correctness of the reliquidation of the collector, but that in this as in other cases of reliquidation where the collector has acted within his authority it is the duty of the importer to go ahead and by proof overcome the presumed correctness of the collector's action. Until this is done it is prima facie correct and must be affirmed.

The judgment of the Board of General Appraisers is *reversed.*

Appendix B.

While the bill which became the act of June 22, 1874, was in the Senate there were the following proceedings:

Mr. Conkling:

I inquire of one of the Senators having charge of the Bill, whose fraud is referred to in this section?

Mr. Sherman:

Any fraud "In the absence of fraud and in the absence of protest by the owner, importer, agent or consignee" is the language. If the Senator can make it more definite I shall be very glad to have him do so.

Mr. Conkling:

I think it means, and I think my friend will agree with me if he turns back to page 3, that it can mean no fraud except that of the importer, the consignee, the person on this side, whatever may be the fraud of the consignor on the other side, and when a liquidation has once occurred, that is final and conclusive upon all parties. The Senator doubtless knows, as well as I do, that at the port of New York perhaps more than anywhere else, owing to the great amount of business, liquidations are made very rapidly, summarily, and it occurs in very many cases that errors are made and importers come voluntarily afterward and tender the duties which were unpaid finding the mistake themselves. Under this section and under previous sections, I under-

stand it would be a crime for a collector to receive a voluntary payment in that case. Then when you come to all the instances of fraud discovered in the consignor, where the invoice was made on the other side and the fraud there took place, the liquidation is quickly made and passed through the custom house, and the Government is forever estopped from readjusting the liquidation. I submit to the Senator from Ohio that the section ought to be changed either by striking out "in the absence of fraud" or in some other mode which will effect the object.

Mr. Sherman:

It is perfectly manifest that this section is intended to prevent stale claims from being made against persons who have imported goods free of duty or who have imported goods and paid the duties in good faith, everybody supposing the settlement was right, and afterward it should turn out by accident or design that too little was collected or some mistake made. This excludes from the benefit of the section every case of fraud.

Mr. Conkling:

Supposing you say "in the absence of fraud, whether of the consignee, or the consignor or their agents." If I go through the custom house, however innocent, and it turns out afterward that I have paid but a small part of the duties chargeable to me, I do not see why, when the officers come to write up their accounts, they should not be permitted to send around to

my office and say, "an error occurred in liquidation yesterday, and you owe the custom house 50 dollars," and why I should not pay it. If this section is to be enforced and care is to be taken, the Senator will see that it will make very slow, very careful, very circumspect this process which now it is all important to importers to have promptly done, with the understanding all around that if an error occurs attention is to be called to that and it is to be adjusted afterwards. Under this section, however, every man must go upon his peril; he must know that he commits the Government absolutely and never can call upon it afterward, or under a previous section that he cannot even receive it without committing a misdemeanor if a voluntary tender of it is made. I would strike out "fraud" altogether, or, if I retained it, I would put in words that would apply to both sides and the agents of both sides.

Mr. Sherman:

Strike out "in the absence of fraud" and we can examine it more fully.

Mr. Sargent:

Then you make it final and conclusive whether there is fraud or not.

Mr. Sherman:

It seems to me the section is right now. It simply prevents a man who has paid honestly and fairly, in the absence of fraud, from being bothered and harassed afterward.

Mr. Boutwell:

Should there not be, as in some other cases, some time fixed, say after the expiration of six years? Of course there should be an end to proceedings, either civil or criminal, in these cases, but that it should be immediate on the delivery of the goods seems to me in the highest degree improper and unadvisable.

Mr. Sherman:

I would make this suggestion, "after a period of one year."

Mr. Boutwell:

I think that is rather short. Three years is the statute of limitation on crimes. One year is too short a time.

Mr. Sherman:

Insert after the words "settlement of duties" the words "after the expiration of one year."

Mr. Boutwell:

I should prefer to say "three" years.

Mr. Sherman:

Well I will say "after the expiration of three years."

Mr. Conkling:

I think that improves it very much.

Mr. Sherman:

I move to insert the words "after the expiration of three years from the time of entry" after the word "shall" in the seventh line. The amendment was agreed to.

Cong. Rec. 1874, Vol. 2[3] page 4726.

Thereafter, a recommendation by the Conference Committee for the substitution of "one" in place of "three," was adopted (pp. 5133-5138, 5167-5168 *Cong. Rec.* 1874, vol. 2[3]).